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In the Supreme Court of the United States

OCTOBER TERM, 1989

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, PETITIONER

v.

ARABIAN AMERICAN OIL CO., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Whether Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, prohibits employment discrimination outside the United States by an American corporation against an American citizen.

PARTIES TO THE PROCEEDING

The petitioner, which was granted leave to intervene in this action while it was pending in the court of appeals, is the Equal Employment Opportunity Commission. The other parties are plaintiff Ali Boureslan and defendants Arabian American Oil Company and Aramco Services Company.

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v.

ARABIAN AMERICAN OIL CO., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the Equal Employment Opportunity Commission, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The panel and en banc opinions of the court of appeals (App., *infra*, 1a-76a) are reported, respectively, at 857 F.2d 1014 and 892 F.2d 1271. The opinion of the district court (App., *infra*, 77a-82a) is reported at 653 F. Supp. 629.

JURISDICTION

The judgment of the court of appeals upon rehearing en banc was entered on February 2, 1990. On April 24, 1990, Justice White extended the time for filing a petition for a writ of certiorari to and including May 23, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, are set forth at App. *infra*, 86a-88a.

STATEMENT

1. Ali Boureslan, the plaintiff in this Title VII action, is a naturalized American citizen who was born in Lebanon. The defendants are two Delaware corporations, Arabian American Oil Company (Aramco) and its subsidiary, Aramco Services Company (ASC). Aramco explores, produces, and refines oil and gas in Saudi Arabia. Its principal place of business is Dhahran, Saudi Arabia, and it is licensed to do business in Texas. ASC's principal place of business is Houston, Texas. App., *infra*, 29a-30a.

In 1979, Boureslan began working as an engineer for ASC in Houston. A year later, his request for a transfer to Aramco was granted, and he relocated to Saudi Arabia. In that country, Boureslan alleges, his supervisor subjected him to a "campaign of harassment," including racial, religious, and ethnic slurs, culminating in his termination on June 16, 1984. App., *infra*, 29a-30a.

2. After filing a charge of discrimination against Aramco with the Equal Employment Opportunity

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Commission, Boureslan commenced this lawsuit against Aramco and ASC. His complaint seeks relief under Title VII and also asserts pendent state law claims. See App., *infra*, 30a. Aramco and ASC moved to dismiss the complaint for lack of subject matter jurisdiction, arguing that Title VII does not apply to discrimination outside the United States. The district court agreed and dismissed the Title VII claim. *Id.* at 77a-82a. It also dismissed Boureslan's state law claims for lack of pendent jurisdiction and entered final judgment in favor of both defendants. See *id.* at 82a.

2. A divided panel of the court of appeals affirmed. App., *infra*, 28a-82a. The court granted rehearing en banc; upon rehearing, the court affirmed by a 9-5 vote. *Id.* at 1a-27a.[1]

a. The en banc majority noted that this Court has recognized a "canon of construction * * * that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." App., *infra*, 3a (quoting *Foley Bros.* v. *Filardo*, 336 U.S. 281, 285 (1949)). Title VII, the majority held, "does not reflect the necessary clear expression of congressional intent to extend its reach beyond our borders." App., *infra*, 7a.

The majority rejected the contention that the statute's "alien exemption"—which provides that Title VII "shall not apply to an employer with respect to

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[1] In the court of appeals, the EEOC participated as an amicus curiae before the panel. After entry of the panel's decision, the Commission was granted leave to intervene for the purpose of seeking further review and participated as a party in the rehearing. App., *infra*, 85a. See 42 U.S.C. 2000e-5(f)(1) (authorizing court, in its discretion, to permit the Commission to intervene in a civil action upon the Commission's certification that the case is of general public importance).

employment of aliens outside any State," 42 U.S.C. 2000e-1—would be superfluous unless Title VII otherwise applies to discrimination outside the United States. The majority observed that "no one disputes that the provision excludes coverage to aliens employed outside the states"; it added, citing *Espinoza* v. *Farah Mfg. Co.*, 414 U.S. 86, 95 (1973), that the alien exemption can also meaningfully be read to reflect "a congressional intent to provide Title VII coverage to aliens employed *within* the United States." App., *infra*, 4a.

The majority characterized Title VII as having a "domestic focus"—reflected in the Act's references to the "United States", "states" and "state proceedings." App., *infra*, 5a. Noting that Title VII "accommodate[s] state employment discrimination proceedings," the majority suggested that "[i]f Congress had intended the Act to apply in foreign countries," it would "have been even more careful to address conflicts with foreign discrimination laws." *Ibid.* The majority also found the Act "curiously silent" on issues that would be raised by extraterritorial application of Title VII: specifically, the appropriate venue for an action arising out of discrimination abroad and, given that the Commission's subpoena power is limited to evidence in the United States and its territories, the means by which the Commission could investigate such claims. *Ibid.* Finally, the majority suggested that, if the Act were applied extraterritorially, its plain language would reach foreign employers that employed American citizens. The majority expressed doubt "that Congress ever intended to impose Title VII on a foreign employer who had the grace to employ an American citizen in its own country." *Id.* at 6a.

b. The dissenting members of the court would have held that "a fair and reasonable reading" of Title VII "compels the conclusion that Congress did, in fact, intend Title VII's broad remedial goals to encompass, and eradicate, an American employer's discriminatory employment practices against a United States citizen, even if the acts constituting such discrimination were carried out on foreign soil." App., *infra*, 7a. The dissent maintained that the alien exemption provides a clear expression of Congress's intent to apply the statute extraterritorially, reasoning that "[i]f Congress had not envisioned an extraterritorial application of Title VII, a specific provision exempting only aliens from such coverage would not have been needed." *Id.* at 9a. The dissent found further support for its understanding of the alien exemption in that provision's legislative history, the EEOC's administrative interpretation of Title VII, and this Court's analysis in *Foley Bros.* *Id.* at 12a-16a & nn.3-7.

REASONS FOR GRANTING THE PETITION

The court of appeals' interpretation of Title VII would withdraw the Act's protection from the many Americans who spend a portion of their careers abroad. That interpretation is not justified by Title VII's language or the well-recognized presumption against the extraterritorial application of federal statutes. By its terms, Title VII reaches discrimination outside the United States, and the statute contains an exemption—for aliens working outside of any State—that would be entirely superfluous if the Act did not apply abroad in the first place. The EEOC, which is charged with administration of Title VII, has construed the statute to apply to discrimina-

tion abroad by American corporations against American citizens. Although there is no conflict among the circuits on this question, every district court that had addressed this issue prior to the decision in this case had reached the same conclusion as the Commission.

The court of appeals' interpretation of Title VII would leave a serious gap in the statute's prohibition against invidious employment discrimination. Many Americans work abroad for at least some part of their careers. Indeed, in many multinational firms, experience in overseas operations is instrumental to advancement. Under the court of appeals' view of the statute, employees accepting overseas assignments would expose themselves to discrimination abroad, and the effects of that discrimination would be felt in employment decisions in this country.

1. Congress undoubtedly has authority to prohibit employment discrimination by American corporations operating abroad. "While the legislation of the Congress, unless the contrary intent appears, is construed to apply only within the territorial jurisdiction of the United States, the question of its application, so far as citizens of the United States in foreign countries is concerned, is one of construction, not of legislative power." *Blackmer* v. *United States*, 284 U.S. 421, 437 (1932).[2] Congress has often exercised its authority to extend the reach of its legislation beyond our borders—for instance, in the antitrust, securities, and trademark laws.[3] Indeed, in the

[2] Accord, *e.g.*, *Vermilya-Brown Co.* v. *Connell*, 335 U.S. 377, 381 (1948); *Foley Bros.* v. *Filardo*, 336 U.S. 281, 284-285 (1949); *Steele* v. *Bulova Watch Co.*, 344 U.S. 280, 285-286 (1952); *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 17 (1963).

[3] See, *e.g.*, *Steele* v. *Bulova Watch Co.*, 344 U.S. 280 (1952) (Lanham Act); *United States* v. *Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945) (antitrust laws); *Psimenos* v. *E.F. Hutton & Co.*, 722 F.2d 1041 (2d Cir. 1983) (securities laws).

area of employment discrimination, Congress recently amended the Age Discrimination in Employment Act of 1967 to prohibit age discrimination against American citizens outside the United States. 29 U.S.C. 623(a), 630(f); see pp. 12-13, *infra*.

This Court, of course, has recognized a canon of construction "which teaches that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *E.g.*, *Foley Bros.* v. *Filardo*, 336 U.S. 281, 285 (1949).[4] That canon "is based on the assumption that Congress is primarily concerned with domestic conditions," *ibid.*; it also serves to protect against unintended conflicts between our laws and those of other nations and resulting international discord, cf. *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21-22 (1963). At bottom, however, the issue remains one of legislative intent; the presumption against the extraterritorial application of American statutes is "a valid

[4] See *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 109 S.Ct. 683, 691 (1989); *Steele* v. *Bulova Watch Co.*, 344 U.S. 280, 285 (1952).

Where the application of an American statute would violate international law, a more stringent variant of the presumption applies. "[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray* v. *Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). See *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21-22 (1963). It would not violate international law to apply Title VII to American citizens employed by American firms outside the United States.

approach whereby unexpressed congressional intent may be ascertained." *Foley Bros.*, 336 U.S. at 285.

The language and legislative history of Title VII are sufficient to rebut the presumption; this is not a case in which Congress's intent to apply a statute abroad was "unexpressed." Title VII's language and legislative history, considered in proper context, affirmatively manifest Congress's intention to prohibit discrimination by American firms against American citizens abroad.

a. By its terms, Title VII applies to employers (with a specified number of employees) that are "engaged in an industry affecting commerce." 42 U.S.C. 2000e(b).[5] Significantly, "commerce" is defined to include both interstate and foreign commerce: for purposes of Title VII, it encompasses "trade, traffic, commerce, transportation, transmission, or communication among the several States; *or between a State and any place outside thereof*; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof." 42 U.S.C. 2000e(g) (emphasis added). Nothing in this language suggests that the Act applies only within the borders of the United States. Indeed, the provisions that determine Title VII's scope are similar to the "broad jurisdictional grant in the Lanham Act" on which this Court relied in holding that that statute applies outside this country. See *Steele* v. *Bulova Watch Co.*, 344 U.S. at 286.

[5] An "industry affecting commerce" is (42 U.S.C. 2000e(h))

> any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959 [29 U.S.C. 401 et seq.] and further includes any governmental industry, business, or activity.

In addition, Title VII includes an exemption that confirms Congress's intent to extend Title VII's protection to American citizens working abroad. Section 702 of the Act, 42 U.S.C. 2000e-1, provides that the statute "shall not apply to an employer with respect to *the employment of aliens outside any State*" (emphasis added). If (as the court of appeals held in this case) Title VII does not apply to discrimination outside the United States in the first place, this exemption is completely gratuitous. Congress would have had no reason to exempt aliens employed abroad unless—like the religious employers that Section 702 also exempts—those aliens would otherwise have been covered by the statute. Aliens employed "outside any State" would only otherwise be covered, however, if Title VII applies extraterritorially.

As the dissent stressed, the import of the alien exemption is inescapable (App., *infra*, 9a):

> [B]y specifically providing an exemption for employers regarding the extraterritorial employment of "aliens," without providing a similar exemption as to the corresponding category of "citizens," Congress intended that American employees would be covered under Title VII.

Cf. *Andrus* v. *Glover Constr. Co.*, 446 U.S. 608, 616-617 (1980) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.").[6]

[6] The majority of the court of appeals offered no plausible explanation of the role the alien exemption might play under its construction of the statute. The majority's observation

b. The legislative history of the alien exemption confirms Congress's intention to extend Title VII's protection to American citizens employed by American firms abroad. A committee report explained that the exemption's purpose is "to remove conflicts of law which might otherwise exist between the United States and a foreign nation in the employment of aliens outside the United States by an American enterprise." H.R. Rep. No. 570, 88th Cong., 1st

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that "no one disputes that the provision excludes coverage to aliens employed outside the states" (App., *infra*, 4a) is beside the point. The issue is not whether the exemption means what it says (we have no doubt that it does), but why such a provision would have been included if the statute were not intended to apply abroad in the first place. Nor is there merit to the majority's suggestion that the alien exemption can be given meaning as a grant of coverage to aliens employed in the United States; Congress could not have intended to employ an *exemption* to extend Title VII's coverage to that group. See *Espinoza* v. *Farah Mfg. Co.*, 414 U.S. at 95 (alien employed in this country is protected by virtue of being an "individual" referred to in Section 703 of the Act, 42 U.S.C. 2000e-2).

Although (as this Court noted in *Espinoza*) the alien exemption is undoubtedly indicative of Congress's intent to cover aliens within the United States, the Court clearly did not suggest that this was the exemption's only significance. In fact, there is a precise parallel between the inference this Court drew in *Espinoza* and the inference that we urge in this case. In each instance, the fact that the Act specifically exempts aliens employed outside the United States demonstrates that a related group outside the exemption—in *Espinoza*, aliens employed *inside* the United States and, here, *citizens* employed abroad—is covered. Far from rejecting the inference on which we rely here, *Espinoza* establishes that it is appropriate to refer to the exemption as a means of ascertaining Congress's intent with respect to Title VII's coverage.

Sess. 4 (1963).[7] Plainly, Congress would have had no occasion to *remove* conflicts of law arising from the employment of aliens outside the United States unless it contemplated that the Act would apply extraterritorially.

c. Although Title VII regulates the relationship between employer and employee, and thus operates in a field in which other statutes have been held not to apply extraterritorially,[8] the statute's subject mat-

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[7] This report addressed H.R. 405, 88th Cong., 1st Sess. (1963). That bill was subsequently incorporated in H.R. 7152, 88th Cong., 2d Sess. (1963), which in turn was ultimately enacted, as amended, as Title VII. The report on H.R. 405 was made part of the record of the hearings on H.R. 7152. See *Civil Rights: Hearings on H.R. 7152 Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 88th Cong., 1st Sess. 2303 (1963).

H.R. 405 was one of a series of fair employment bills considered by the House Committee on Education and Labor. The first to contain an alien exemption, H.R. 4453, 81st Cong., 1st Sess. (1949), was introduced by Adam Clayton Powell on April 29, 1949. Six weeks earlier, in holding that the Eight Hour Law did not apply outside the United States, this Court had placed particular stress on "[t]he absence of any distinction between citizen and alien labor." *Foley Bros.* v. *Filardo*, 336 U.S. at 286. It seems likely that H.R. 4453 was drafted to meet the concern expressed in *Foley Bros.*—that is, to draw the distinction found lacking in *Foley Bros.* so as to remove that perceived impediment to extraterritorial application.

[8] See *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, *supra* (NLRA does not apply to seamen aboard foreign flag vessels owned by foreign subsidiary of American corporation); *Benz* v. *Compania Naviera Hidalgo, S.A.*, 353 U.S. 138 (1957) (LMRA does not apply to picketing of foreign ship operated entirely by foreign seamen under foreign articles); *Foley Bros.* v. *Filardo*, *supra* (Eight Hour Law does not apply to government contracts performed in Iran). But cf. *Vermilya-Brown Co.* v. *Connell*, *supra* ("pos-

ter provides no basis for questioning Congress's intention to attack discrimination abroad against American citizens by American employers. In essence, Title VII prohibits discrimination against one or more individuals by an employer, as opposed to regulating the relations between the employer and its employees generally. There is nothing unusual in the idea that Congress's concern about this type of individual injury—or its determination to provide a remedy—extends outside the United States.

Congress's willingness to extend the ADEA's prohibition on age discrimination beyond our borders underscores its willingness to strike at discrimination against American citizens by American employers abroad. In 1984, after several courts of appeals had held that the ADEA did not apply abroad,[9] Congress amended that statute's definition of employee to include "any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country," 29 U.S.C. 630(f), and specified the employers to which the Act would apply, 29

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sessions" of the United States that are subject to the FLSA include bases leased from Great Britain). Significantly, none of the statutes which were held not to apply extraterritorially was limited by its terms to American citizens, posing particular problems if the statute were interpreted to apply abroad. Title VII is so limited.

[9] *Zahourek* v. *Arthur Young & Co.*, 750 F.2d 827 (10th Cir. 1984); *Cleary* v. *United States Lines, Inc.*, 728 F.2d 607 (3d Cir. 1984). See *Pfeiffer* v. *Wm. Wrigley Jr. Co.*, 755 F.2d 554 (7th Cir. 1985). As these courts noted, the ADEA has no provision comparable to Title VII's alien exemption. Further, unlike Title VII, the ADEA incorporates provisions of the FLSA, including a provision expressly excluding work performed in a workplace in a foreign country from the FLSA.

U.S.C. 623(f)(1) and (h). Supporters of this legislation emphasized that these amendments were appropriate to conform the ADEA's prohibition on age discrimination to the equivalent provisions of Title VII. The Senate sponsor of the ADEA amendments noted that "the substantive prohibitions of the [ADEA] are worded nearly exactly as those in title VII, which at least two district courts have held does apply abroad," and argued that his proposed amendment would "clear[] up an anomaly" that "Congress never intended." 129 Cong. Rec. 34,499 (1983) (remarks of Sen. Grassley).[10]

The court of appeals' interpretation of Title VII would create a similar anomaly. Americans employed overseas would be protected from age discrimination, but not from discrimination based upon race, sex, religion, or national origin. The language of Title VII—including its general jurisdictional provisions and the alien exemption—forecloses attributing such an odd result to Congress.

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[10] Similarly, during hearings on the proposed legislation, the EEOC's Chairman testified that Title VII had been construed to apply to discrimination outside of the United States. See *Age Discrimination and Overseas Americans, 1983: Hearing Before the Subcomm. on Aging of the Senate Comm. on Labor and Human Resources*, 98th Cong., 1st Sess. 2-4 (1983) (testimony of Clarence Thomas).

We do not suggest that the legislative history of the 1984 ADEA amendments is indicative of the intent of the 1964 Congress that enacted Title VII. However, that history lays to rest the majority's suggestion (App., *infra*, 6a) that differences in the language of the ADEA and Title VII justify attributing an intention not to apply the 1964 Act to American citizens outside the United States; it also undercuts any argument that Congress is generally reluctant to see its anti-discrimination legislation applied abroad.

2. Before the decision in this case, many authorities had agreed that Title VII applies to discrimination abroad by American employers against American citizens. Every prior district court decision had reached that conclusion. *Seville* v. *Martin Marietta Corp.*, 638 F. Supp. 590 (D. Md. 1986); *Bryant* v. *International Schools Servs., Inc.*, 502 F. Supp. 472 (D.N.J. 1980), rev'd on other grounds, 675 F.2d 562 (3d Cir. 1982); *Love* v. *Pullman Co.*, 13 Fair Empl. Prac. Cas. (BNA) 423, 426 n.4 (D. Colo. 1976), aff'd on other grounds, 569 F.2d 1074 (10th Cir. 1978). See also *Lavrov* v. *NCR Corp.*, 600 F. Supp. 923, 931-932 & n.5 (S.D. Ohio 1984). In these cases, the courts found that the alien exemption was a strong indication of Congress's intention to protect American citizens from discrimination abroad. See, *e.g.*, *Love* v. *Pullman Co.*, 13 Fair Empl. Prac. Cas. (BNA) at 426 n.4 ("Since Congress explicitly excluded aliens employed outside of any state, it must have intended to provide relief to American citizens employed outside of any state * * *.").

In addition, the EEOC, the agency charged with administration of Title VII, has for at least 15 years interpreted the statute to apply to discrimination by American employers against American citizens outside the United States. In 1975, in a letter to a member of the Senate Foreign Relations Committee, the EEOC's General Counsel stated that "[t]he language of Title VII indicates a Congressional intent to make the Title applicable to American citizens employed by American companies operating overseas."[11] As has been noted (note 10, *supra*), the Commission's Chairman reiterated that construction in 1984, when Congress considered whether the ADEA should be

[11] Addendum 1 to EEOC C.A. En Banc Br.

amended to prohibit age discrimination to the same extent. The Commission adhered to that interpretation in a decision on a charge of discrimination occurring abroad, Decision No. 85-16, Empl. Prac. Dec. (CCH) ¶ 6856 (1985), and recently issued a general policy statement setting forth the circumstances under which it will apply Title VII to charges of discrimination overseas, Policy Statement No. N-915.033, EEOC Compl. Man. (CCH) ¶ 2164 (1988).

Finally, the Justice Department has also construed Title VII to apply to discrimination abroad. In 1975, then-Assistant Attorney General Scalia testified before committees of both Houses of Congress that the alien exemption implies that Title VII applies outside the United States. He stated:

> It should be noted that both Executive Order 11478 and § 717 of Title VII specify that they are not applicable to "aliens employed outside the limits of the United States." The implication of this is that they do apply to United States citizens employed throughout the world.
>
> With respect to discrimination in employment by private companies and individuals, Title VII of the 1964 Civil Rights Act, as amended, prohibits a broad range of "unlawful employment practices" by any private employer "engaged in an industry affecting commerce who has fifteen or more employees." * * * Once again the statue [*sic*] contains an exemption "with respect to the employment of aliens outside any State," which implies that it is applicable to the employment of United States citizens by covered employers anywhere in the world.[12]

[12] *Foreign Investment and Arab Boycott Legislation: Hearings Before the Subcomm. on International Finance of the Senate Comm. on Banking, Housing and Urban Affairs*, 94th

In keeping with this testimony, Section 717 of Title VII, 42 U.S.C. 2000e-16, which governs the employment practices of federal agencies, has been applied to alleged discrimination outside the United States. See, *e.g.*, *Brown* v. *Marsh*, 777 F.2d 8 (D.C. Cir. 1985) (Title VII action by civilian employed at a military base in Germany).

Unless further review is granted, the court of appeals' decision will foster confusion in this area of the law.

3. Title VII implements a national goal of the "highest priority." *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 47 (1974). Necessarily, therefore, the question whether the Nation's policy against discrimination is to apply to Americans working abroad is an issue of great importance. The precise number of Americans working abroad for American employers at any one time is difficult to gauge, but there are indications that the figure is a large one. The State Department has estimated that in 1988 there were almost 2.2 million American citizens residing abroad.[13] Although this figure includes dependents, persons who are unemployed or retired, and employees of non-U.S. firms, the number of Americans employed by American firms overseas is substantial.

Cong., 1st Sess. 165 (1975). Accord *Discriminatory Arab Pressure on U.S. Business: Hearings Before the Subcomm. on International Trade and Commerce of the House Comm. on International Relations*, 94th Cong., 1st Sess. 87-88 (1975); *Discriminatory Overseas Assignment Policies of Federal Agencies: Hearings Before a Subcomm. of the House Comm. on Government Operations*, 94th Cong., 1st & 2d Sess. 87-89 (1975-1976).

[13] See *The World Almanac and Book of Facts: 1990*, at 555 (1989). This figure excludes servicemen and federal employees and their dependents.

The class of individuals potentially affected by the question presented in this case is greater than the number employed abroad at any point in time. In many multinational corporations based in this country, assignments in foreign offices are important means through which employees can enrich their experience or enhance their opportunities for advancement. Under the court of appeals' interpretation of Title VII, those employees who seek to take advantage of those opportunities at some point in their careers would be required to relinquish protection from invidious employment discrimination.

The fact that many careers in American firms encompass employment both inside and outside the United States forecloses any sharp division between discrimination in this country and abroad. In those enterprises in which successful performance in overseas assignments is essential or desirable for promotion, the effects of discrimination abroad will be reflected in employment decisions and career paths in this country. In this light, it is not surprising that Congress chose, as the alien exemption reflects, to extend Title VII's protection to Americans whose careers with American firms take them abroad.

The issue of Title VII's extraterritorial application is recurrent as well as important. As of January 23, 1989, the Commission was investigating 50 charges that allege violations of Title VII arising out of employment actions or practices that took place or were implemented overseas. Twenty-eight of these charges are pending in the EEOC's Houston district office, within the Fifth Circuit.

The question presented by this case—whether Title VII's guarantee of equal employment opportunity is to be withdrawn from Americans whose

careers take them abroad to work for American employers—is an issue of widespread importance and should be resolved by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 1990

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 87-2206

ALI BOURESLAN, PLAINTIFF-APPELLANT,

v.

ARAMCO, ARABIAN AMERICAN OIL CO.
and ARAMCO SERVICE COMPANY,
DEFENDANTS-APPELLEES.

Appeal from the United States District Court
for the Southern District of Texas.

Feb. 2, 1990

Before CLARK, Chief Judge, GEE, REAVLEY, POLITZ, KING, JOHNSON, WILLIAMS, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH and DUHE, Circuit Judges.

W. EUGENE DAVIS, Circuit Judge:

We sit en banc in this case to consider a single question: whether Title VII regulates the employment practices of U.S. employers which employ U.S. citizens outside the United States. We affirm the district court's order dismissing this suit.

I.

In his Title VII suit, Boureslan charged that while he was working in Saudi Arabia his employer, Arab-

ian American Oil Co. (Aramco), discriminated against him because of his race, religion and national origin. Aramco's motion to dismiss for lack of jurisdiction squarely raised the question whether Title VII's protection extends to U.S. citizens employed abroad by U.S. employers.

We answer this question in the negative as did the district court and the panel majority. *See Boureslan v. Aramco*, 857 F.2d 1014 (5th Cir.1988). In reaching this conclusion we adopt the reasoning of the panel majority. We write briefly to summarize the reasons for our conclusion and to include two points that were more fully developed during en banc briefing and argument.

II.

A.

The respect for the right of nations to regulate conduct within their own borders is a fundamental concept of sovereignty that is not lightly tossed aside. *See American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356, 29 S.Ct. 511, 512, 53 L.Ed. 826 (1909); *Blackmer v. United States*, 284 U.S. 421, 437, 52 S.Ct. 252, 254, 76 L.Ed. 375 (1932). From this concept the established presumption against extraterritorial application of a statute developed. *Id.* The critical question that governs this appeal is whether Congress included language in Title VII that reflects a clear congressional intent to overcome the presumption against extraterritorial application of the Act.

The Supreme Court described this presumption in *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285, 69 S.Ct. 575, 577, 93 L.Ed. 680 (1949), a case closely analogous to the case at hand. In that case, Filardo, a U.S. citizen, argued that the Federal Eight Hour Law entitled him to overtime pay for work he had

performed while in the employ of Foley Brothers, a U.S. government contractor operating in Iran and Iraq. The Court, in rejecting Filardo's claim, explained the nature of the presumption against extraterritorial application of a statute:

> The canon of construction which teaches that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States . . . is a valid approach whereby unexpressed congressional intent may be ascertained. It is based on the assumption that Congress is primarily concerned with domestic conditions. We find nothing in the Act itself . . . nor in the legislative history, which would lead to the belief that Congress entertained any intention other than the normal one in this case.

Id. The Court's scrutiny of the Eight Hour Law's statutory language and structure revealed no congressional intent to cover workers such as Filardo—a conclusion bolstered by the legislative history's focus on domestic wage and unemployment problems. *Id.* at 285-87, 69 S.Ct. at 577-78. In examining this statute, the Supreme Court set out the standard by which we must measure Boureslan's arguments: "An intention so to regulate labor conditions which are the primary concern of a foreign country should not be attributed to Congress in the absence of a *clearly expressed purpose.*" *Id.* at 286, 69 S.Ct. at 578 (emphasis added).

B.

Boureslan's argument that Title VII reflects a clear congressional intent to extend its reach outside this

country chiefly rests on Title VII's alien exemption provision, 42 U.S.C. § 2000e-1. This provision which expressly establishes an exemption from coverage under the Act provides: "This title shall not apply to an employer with respect to employment of aliens outside of any state." Bourselan finds the necessary clear expression of congressional intent to apply Title VII abroad by drawing a negative inference from that provision and concluding that Congress meant to *include* citizens working abroad when it excluded aliens abroad. We disagree, and for the reasons that follow conclude that this single negative inference falls short of the required clear expression of congressional intent necessary to extend the reach of the Act outside this country.

1.

Boureslan argues first that if we do not attach his negative inference to the alien exemption provision, we strip the provision of all purpose. This is simply not accurate. As we noted in the panel opinion, "no one disputes that the provision excludes coverage to aliens employed outside the states." *Boureslan*, 857 F.2d at 1018. Also the Supreme Court in *Espinoza v. Farrah Mfg. Co.*, 414 U.S. 86, 95, 94 S.Ct. 334, 340, 38 L.Ed.2d 287 (1973), determined that this provision reflects a congressional intent to provide Title VII coverage to aliens employed *within* the United States. Thus, we remain persuaded that we need not choose to either attach Boureslan's negative inference to this provision or strip the provision of all meaning. Even if we decline to give the alien exemption provision the interpretation appellant seeks, the provision is still a meaningful and useful part of the Act.

2.

The domestic focus of the Act is also inconsistent with an intent to give extraterritorial reach to it. As noted in the panel opinion, Boureslan's effort to read an international reach into Title VII's general policy statements and alien exemption provision fails in light of repeated references in the Civil Rights Act of 1964 to "United States", "states" and "state proceedings." *See Boureslan*, 857 F.2d at 1019.

In Title VII itself, Congress specifically accommodated state employment discrimination proceedings in an effort to avoid conflicts with state law and recognized state interests. *See* 42 U.S.C. §§ 2000e-5(c), (d), (e). If Congress had intended the Act to apply in foreign countries, we would expect Congress to have been even more careful to address conflicts with foreign discrimination laws. Yet the statute says nothing about potential conflicts with foreign discrimination laws.

3.

The Act is also curiously silent in a number of areas where Congress ordinarily speaks if it wants to extend its legislation beyond our borders. First, the Act fails to address venue problems that arise with foreign violations. *Cf.* 42 U.S.C. § 2000e-5(f)(3) (establishing venue "in any judicial district in the State in which the unlawful employment practice is alleged to have been committed. . . ."). Next, the Equal Employment Opportunity Council's investigatory powers are limited to evidence obtained in the United States and its territories. 42 U.S.C. § 2000e-9.

Finally, if we give extraterritorial reach to Title VII, the plain language of the Act would necessarily

extend that title to govern the employment relationship between foreign employers, and their American employees anywhere in the world. See § 2000e(b). We say this because nothing in the Act exempts foreign employers and our courts have held that foreign employers engaged in commerce in the United States are employers under Title VII. *See, e.g., Spiess v. C. Itoh & Co. (America), Inc.*, 643 F.2d 353 (5th Cir.1981). We doubt that Congress ever intended to impose Title VII on a foreign employer who had the grace to employ an American citizen in its own country.

4.

As the Court stated as recently as January 1989, when it desires to do so, Congress knows how to give extraterritorial effect to one of its statutes. *Argentine Republic v. Amerada Hess Shipping Co.*, —— U.S. ——, 109 S.Ct. 683, 691, 102 L.Ed.2d 818, 832 (1989). A good example is the Age Discrimination and Employment Act which was amended in 1984 to give the Act extraterritorial application. 29 U.S.C. § 630(f) ("The term 'employee' includes any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country."). *See also* The Comprehensive Anti-Apartheid Act of 1986, 22 U.S.C. §§ 5001-5116 (1979, Supp. 1989); The Export Administration Act, 50 U.S.C. app. §§ 2401-2420 (Supp.1989). Congress demonstrated in the above acts its awareness of the need to make a clear statement of extraterritorial application, address the concerns of conflicting foreign law, and provide the usual nuts-and-bolts provisions for enforcing those rights.

C.

In essence, Boureslan asks this court to conclude that Congress balanced Title VII's important goals against the foreign sovereignty concerns that underlie the presumption against extraterritoriality, considered the implications of application abroad and then addressed these concerns by inviting courts to read between the lines. For the reasons stated above, we cannot accept this conclusion and hold that Title VII does not reflect the necessary clear expression of congressional intent to extend its reach beyond our borders.

AFFIRMED.

KING, Circuit Judge, with whom REAVLEY, POLITZ, JOHNSON and WILLIAMS, Circuit Judges, join dissenting:

I agree with the majority that the sole question presented in this en banc rehearing is whether Congress acted to extend the protections of Title VII to United States citizens employed in other countries by United States employers. I believe that a fair and reasonable reading of this civil rights statute compels the conclusion that Congress did, in fact, intend Title VII's broad remedial goals to encompass, and eradicate, an American employer's discriminatory employment practices against a United States citizen, even if the acts constituting such discrimination were carried out on foreign soil. Therefore, I must respectfully dissent from the majority's holding, which has affirmed the district court's dismissal of appellant Boureslan's action.

The Alien Exemption Clause

It is undisputed that Congress has the power to extend the protection of its laws extraterritorially

when it is regulating the conduct of United States nationals. *See, e.g., Steele v. Bulova Watch Co.*, 344 U.S. 280, 282-83, 73 S.Ct. 252, 253, 97 L.Ed. 319 (1952); *United States v. Mitchell*, 553 F.2d 996, 1001 (5th Cir.1977). In determining whether Congress intended to exercise this power when it enacted Title VII, we are guided by a presumption that acts of Congress are intended to apply only within the territory of the United States unless there is a clear expression of congressional intent to the contrary. *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285, 69 S.Ct. 575, 577, 93 L.Ed. 680 (1949); *Mitchell*, 553 F.2d at 1002.[1]

A clear expression of Congress's intent regarding the extraterritorial reach of Title VII is found in

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[1] There is a second, and distinct, presumption that Congress does not intend to violate international law. A statute may not be construed to violate international law unless Congress has, by an "affirmative expression" of its intent, required such a construction. *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21-22, 83 S.Ct. 671, 677, 9 L.Ed.2d 547 (1963); *Weinberger v. Rossi*, 456 U.S. 25, 32, 102 S.Ct. 1510, 1516, 71 L.Ed.2d 715 (1982). As I explained in considerable detail in my panel dissent, extraterritorial application of Title VII under the circumstances before us would not violate international law; therefore, this presumption does not apply in the instant case. *See Boureslan*, 857 F.2d at 1021-31 (King, J., dissenting).

The less stringent standard of the presumption against extraterritorial application of a federal statute does not require an explicit, affirmative statement of Congress. Instead, the Supreme Court has said that the presumption "is a valid means whereby *unexpressed* congressional intent may be ascertained." *Foley Bros.*, 336 U.S. at 285, 69 S.Ct. at 577 (emphasis added). The question involved in our determination is what showing of congressional intent is sufficiently clear to overcome the presumption against extraterritorial application.

section 702 of the statute, the alien exemption clause. 42 U.S.C. § 2000e-1. This section provides that Title VII "shall not apply to an employer with respect to the employment of aliens outside any State." *Id.* If Congress had not envisioned an extraterritorial application of Title VII, a specific provision exempting only aliens from such coverage would not have been needed. Likewise, if Congress had intended in section 702 to explicitly reject extraterritorial application, it would have used one of the statute's general terms: "individuals" or "employees." *See, e.g.*, 42 U.S.C. § 2000e-2 (prohibiting discrimination against "any individual" with respect to his or her employment). *Compare* Fair Labor Standards Act, 29 U.S.C. § 213(f) (excluding from FLSA coverage "any employee" whose services are performed in a foreign country). Canons of statutory construction require that we interpret a statute "to give effect, if possible, to every word Congress used." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339, 99 S.Ct. 2326, 2331, 60 L.Ed.2d 931 (1979); *see also Argentine Republic v. Amerada Hess Shipping Corp.*, — U.S. ——, 109 S.Ct. 683, 691, 102 L.Ed.2d 818 (1989) (refusing to construe statute to render its terms nugatory); *Beisler v. Commissioner*, 814 F.2d 1304, 1307 (9th Cir.1987) ("We should avoid an interpretation of the statute that renders any part of it superfluous and does not give effect to all of the words used by Congress."). The logical and necessary interpretation of section 702 is that, by specifically providing an exemption for employers regarding the extraterritorial employment of "aliens," without providing a similar exemption as to the corresponding category of "citizens," Congress intended that American employees would be covered under Title VII.

In response to this common-sense interpretation of section 702, the majority relies on two alternative interpretations. First, the majority suggests that the alien exemption provision means simply that aliens employed outside the United States are not covered by Title VII. I do not contend, of course, that section 702 does not mean what it says. However, such a narrow reading of Congress's language, although superficially appealing, is unreasonable because it renders the provision purposeless: if no individual was intended to be covered extraterritorially by Title VII, a specific provision excluding only aliens would be superfluous.

Next, the majority points to a parallel inference that one may draw from section 702: that aliens employed *within* the United States *are* covered by the Act. While this inference also follows logically from the language of the statute, it is in itself redundant because use of the term "individual" in defining "employee" is sufficient to bring aliens residing in the United States within the statute's coverage. 42 U.S.C. § 2000e(f). *See Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 95, 94 S.Ct. 334, 38 L.Ed.2d 287 (1973). Indeed, Congress could not have provided otherwise without violating the equal protection principles implicit in the fifth amendment. *See Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886); *Bolling v. Sharpe*, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed 884 (1954). Moreover, if Congress's sole purpose in the alien exemption clause was to *provide* coverage to aliens residing in the United States, the more logical location in the statute to express this intent would have been the definition section, where Congress defined "employee," *see* 42 U.S.C. § 2000e(f), not the provision entitled "Exemption," where Congress provided for the limited exceptions to the broad remedial goals of Title VII.[2]

The majority opinion cites *Espinoza* apparently for the proposition that a negative inference that aliens within the United States are covered under Title VII is the "correct" interpretation of Congress's intent in enacting section 702. The plaintiff in *Espinoza* was a Mexican citizen residing in the United States. Explaining that Title VII protects resident aliens against illegal discrimination, the Supreme Court noted that congressional intent on this matter could be derived through a negative inference from section 702. *Espinoza*, 414 U.S. at 95, 94 S.Ct. at 340. Not faced with the question of extraterritorial application, the Court had no need to discuss the mirror inference that is reflected in section 702, although the Court's rationale regarding statutory interpretation supports the derivation of such a legitimate inference. Moreover, the Court pointed out that Congress's intent in Title VII to include aliens could also be derived from its use of the term "any individual" in section 703, *id.*, supporting my point that section 702 would be redundant if the *Espinoza* inference were the only reason for its existence. Thus, the inference that the Supreme Court drew from section 702 in *Espinoza* does not preclude, but rather supports, the equally permissible—and, in fact, more reasonable—infer-

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[2] As a matter of statutory construction, *every part* of the statute is to be considered, including subheadings that Congress has placed on the various sections, to arrive at the statute's clear and total meaning. *House v. Commissioner*, 453 F.2d 982, 987 (5th Cir.1972); *see also Hardin v. City Title & Escrow Co.*, 797 F.2d 1037, 1039 (D.C.Cir.1986) (a descriptive subtitle that was part of an act as written by Congress constitutes an indication of congressional intent) (unanimous opinion of Judges MacKinnon, Bork, and Scalia).

ence that Congress intended Title VII to protect United States citizens employed outside the United States.

Although the legislative history of section 702 is not remarkably illuminating, I have found nothing in the published records that contradicts my interpretation of the provision's extraterritorial language. Rather, it seems clear that section 702 is a "limited exemption" for employers and that "the intent of the [alien] exemption is *to remove conflicts of law which might otherwise exist* between the United States and a foreign nation in the employment of aliens outside the United States by an American enterprise." *Civil Rights: Hearings on H.R. 7152 Before the House Committee on the Judiciary*, 88th Cong., 1st Sess. 2303 (1963) (testimony of Representative Roosevelt explaining provisions of H.R. 405, which was incorporated into Title VII of H.R. 7152) (emphasis added).[3] If Title VII was not intended to apply ex-

[3] The context of this legislative history is explained in my panel dissent, 857 F.2d at 1032 n.26. Arguing that we may not "substitute legislative history for the language of the Act," the panel majority dismissed this "snippet" of legislative history as insignificant. *Id.* at 1018, 1020. Contrary to the majority's characterization of my position, I am not attempting to rely on legislative history to compensate for a lack of statutory language. As explained in this dissenting opinion, I believe the only reasonable interpretation of the plain language of section 702 is that Congress intended an extraterritorial scope for Title VII as between United States citizens and United States employers who are otherwise covered under the Act. In other words, an "exemption" must necessarily be an exemption *from* coverage that all individuals covered under section 703 would otherwise enjoy. The legislative history in this case simply serves to establish that Congress did not mistakenly or clumsily include language in the statute that is superfluous or nonsensical.

traterritorially, Congress would not have been concerned with conflicts of law "which might otherwise exist."[4]

Section 702 obviously reflects Congress's concern that the extraterritorial coverage of aliens under Title VII would infringe the sovereignty of other nations,

[4] The administrative interpretation of Title VII also supports its extraterritorial application. Intervenor-appellant, the Equal Employment Opportunity Commission ("EEOC"), the administrative agency charged by Congress with the responsibility for interpreting and enforcing Title VII, has adopted the position that Title VII applies to American citizens employed by United States firms outside the United States. *See, e.g.*, EEOC Dec. No. 85-16, 2 Empl.Prac.Guide (CCH) ¶ 6857, at 7070-75 (Sept. 16, 1985); Letter from William A. Carey, EEOC General Counsel, to Sen. Frank Church (Mar. 14, 1975), *reprinted in* Note, *Civil Rights, Employment and the Multinational Corporations*, 10 Cornell Int'l L.J. 87, 102-03 (1976) ("If Section 702 is to have any meaning at all, . . . it is necessary to construe it as expressing a Congressional intent to extend the coverage of Title VII to include employment conditions of citizens in overseas operations of domestic corporations at the same time it excludes aliens of the domestic corporation from the operation of the statute.").

Likewise, the Department of Justice has taken the position that the statute applies extraterritorially. In 1975 during legislative debates over a proposed prohibition on participation in foreign boycotts requiring religion-based employment discrimination, then-Assistant Attorney General Antonin Scalia testified that Title VII already applied to the employment of United States citizens by covered employers anywhere in the world. *See Discretionary Arab Pressure on U.S. Business: Hearings Before the Subcomm. on International Trade and Commerce of the House Comm. on International Relations*, 94th Cong., 1st Sess. 88 (1975) (statement of Antonin Scalia, Assistant Attorney General), *quoted in* Note, *Equal Employment Opportunity for Americans Abroad*, 62 N.Y.U.L.Rev. 1288, 1291 (1987).

in that the United States would be imposing its laws on foreign nationals working outside the United States. The effect on foreign jurisdictional sovereignty is far less pronounced, and in some cases could be negligible, when extraterritorial application of Title VII is limited to cases involving United States citizens employed by "American enterprises." This relationship reflects an area where concerns for international sovereignty, comity, and conflicts of law—concerns that explain the alien exemption provision—are outweighed by Congress's commitment in Title VII to protect the personal right of all individuals to equal employment opportunities.[5] *See Bourselan*, 857 F.2d at 1028-30 (King., J., dissenting).

An interpretation of section 702 that extends coverage of Title VII to citizens employed by United States employers in other countries, while denying such coverage to aliens, is supported by the Supreme Court's statutory analysis in *Foley Bros.*, where the Court interpreted another federal statute, the Eight Hour Law, to provide only domestic coverage. 336 U.S. at 285, 69 S.Ct. at 577. The majority cites *Foley Bros.* as a "closely analogous" case to illustrate the presumption against extraterritorial application of a federal statute.[6] A more careful analysis of *Foley*

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[5] Congress explained that Title VII was necessary:

> to remove obstructions to the free flow of interstate and foreign commerce and to insure the complete and full enjoyment by all persons of the rights, privileges, and immunities secured and protected by the Constitution.

House Report on Civil Rights Act of 1964, H.R. Rep. No. 914, 88th Cong., 1st Sess., *reprinted in* 1964 U.S.Code Cong. & Ad.News 2391, 2402.

[6] I disagree that a statute such as the Eight Hour Law is "closely analogous" to Title VII. Labor laws regulating economic conditions of employment or labor-management relations involve different legislative policies—more distinctly domestic policies—and create greater risks of insulting the sovereignty of a foreign nation than does a civil rights statute such as Title VII, which reflects the more universal concerns for individual rights and liberties. *See generally* Note, *Title VII of the Civil Rights Act of 1964 and the Multinational Enterprise*, 73 Geo. L.J. 1465, 1480-83 (1985); *see also* Dehner, *Multinational Enterprise and Racial Non-Discrimination: U.S. Enforcement of an International Human Right*, 15 Harv.Int'l L.J. 71, 91-94, 100 (1974).

Bros. indicates, however, that the Court found in that case that the Eight Hour Law, as opposed to Title VII, contained no language that gave any indication of a congressional purpose to extend the law's coverage extraterritorially. The Court relied heavily on the fact that the statute drew no distinction between citizens and aliens. An extraterritorial application, therefore, would necessarily involve foreign national laborers, thereby creating a risk that the United States would intrude upon an area of "local concern" to foreign nations.[7] The Court explained:

> No distinction is drawn between laborers who are aliens and those who are citizens of the United

[7] The majority quotes the following language from *Foley Bros.*: "An intention so to regulate labor conditions which are the primary concern of a foreign country should not be attributed to Congress in the absence of a clearly expressed purpose." 336 U.S. at 286, 69 S.Ct. at 578. In this quoted passage, the labor conditions of "primary concern" to foreign nations refers to the employment of *aliens* by United States enterprises abroad—the very concern eliminated by the alien exemption provision in Title VII. The Supreme Court does not imply in *Foley Bros.*—and it is disingenuous of the majority to suggest—that the labor conditions of United States citizens employed abroad by United States corporations are "the primary concern of a foreign country."

> States. Unless we were to read such a distinction into the statute we should be forced to conclude, under respondent's reasoning, that Congress intended to regulate the working hours of a citizen of Iran who chanced to be employed on a public work of the United States in that foreign land. . . . The absence of any distinction between citizen and alien labor indicates to us that the statute was intended to apply only to those places where the labor conditions of both citizen and alien employees are a probable concern of Congress. Such places do not include foreign countries such as Iraq and Iran.

Id. at 286, 69 S.Ct. at 578.

By explicitly exempting aliens employed abroad from the scope of Title VII, Congress addressed the factor that the Supreme Court had identified as most likely to violate principles of foreign sovereignty in the extraterritorial application of United States labor laws. I find it compelling that Title VII's alien exemption provision is derived from a fair employment bill that first appeared in April of 1949, H.R. 4453, 81st Cong., 1st Sess., only a few weeks after the Supreme Court's decision in *Foley Bros.*, and that the purpose ascribed to the exemption by the House Committee on Education and Labor some 14 years later tracks the rationale of the *Foley Bros.* decision. *Civil Rights: Hearings on H.R. 7152 Before the House Committee on the Judiciary*, 88th Cong., 1st Sess. 2303 (1963).

Appellee Aramco's broad assertion that no other United States labor law has been construed to apply abroad ignores the fact that no other labor law has contained a specific provision that addressed the concern raised in *Foley Bros.* Only Title VII provides

an exemption from extraterritorial application based on nationality. Moreover, in light of the 1984 amendment to the Age Discrimination in Employment Act,[8] 29 U.S.C. § 621 *et seq.*, ("ADEA"), it cannot be maintained that Congress has consistently declined to protect the rights of American workers employed abroad, or that such protection does not comport with federal policies.

Title VII "Nuts and Bolts"

Although failing to point to any statutory provisions that would preclude extraterritorial application of Title VII, the majority argues that the "focus" and the "nuts and bolts" provisions of the Act are "inconsistent" with a congressional intent to provide extraterritorial coverage to United States citizens. Looking first to the domestic focus of Title VII, I agree with the majority that the Act and its legislative history make several references to problems of employment discrimination within the United States and to state laws governing employment practices. Such references are not inconsistent with the exercise of extraterritorial jurisdiction based on nationality. The impetus for Congress to enact Title VII, as is true for most federal legislation, was to remedy a perceived domestic problem. Congress's intent to apply the statute extraterritorially is a separate issue, and is clearly evidenced in the alien exemption provision. In addition, as I noted in my panel dissent, the effects of employment discrimination suffered by United States citizens while employed in other coun-

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[8] *See* 29 U.S.C. § 630(f) ("The term 'employee' includes any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country.").

tries by United States employers are sufficiently pervasive to be felt in this country. *Boureslan*, 857 F.2d at 1027. I also noted that Congress was not concerned solely with the domestic effects of discrimination, but also with the image of the United States in the international community. *Id.* at 1027-28.

The geographic references in Title VII that relate to the Commerce Clause apply to limit the scope of the term "employer" to those engaged in an industry affecting commerce as that term is defined in the statute. *See* 42 U.S.C. § 2000e. However, this traditional Commerce Clause language does not by itself evidence an intent to restrict the geographic scope of the statute, but rather serves as a "nexus" requirement, providing a basis for Congress's exercise of power under the Commerce Clause. When Congress amended the ADEA in 1984 to provide explicitly for extraterritorial application, it did not alter the virtually identical Commerce Clause language found in that statute. *See* 29 U.S.C. § 630. Rather, it exempted foreign employers not controlled by United States employers. Thus, Congress clearly does not view the Commerce Clause language as a geographic restriction on the scope of an employment discrimination statute.

The majority also argues that Congress could not have intended Title VII to apply extraterritorially because Congress failed to exempt foreign employers that hire United States citizens. It is true that the amendments to the ADEA addressed this concern [9]

[9] *See* Age Discrimination in Employment Act, 29 U.S.C. § 623(g)(2) ("The prohibitions of this section shall not apply where the employer is a foreign person not controlled by an American employer."). This provision was aparently added on the suggestion of the EEOC. *See Age Discrimination and Overseas Americans, 1983: Hearing Before the Subcomm. on Aging of the Senate Comm. on Labor and Human Resources*, 98th Cong., 1st Sess. 5 (1983).

and that an attempt to apply the statute to foreign corporations employing United States citizens abroad could offend the sovereignty of other nations. The legislative history explaining the alien exemption provision of Title VII refers explicitly, however, to "an American enterprise." It follows that Congress intended Title VII to apply extraterritorially only to American employers. However, even if the Commerce Clause language to which the majority refers, 29 U.S.C. § 2000e(b), is the only limitation on "employers" subject to the statute's extraterritorial application, Congress has elsewhere provided an equal or broader jurisdictional grant in a statute and left to the courts the task of applying Commerce Clause analysis and principles of international law to determine whether there is an adequate basis for the exercise of jurisdiction over the acts of a particular defendant occurring outside the territory of the United States. *See, e.g., American Rice, Inc. v. Arkansas Rice Growers Cooperatives Ass'n*, 701 F.2d 408 (5th Cir.1983) (Lanham Act); *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909 (D.D.Cir.1984) (Sherman Act).[10]

The majority next points to Title VII enforcement provisions relating to state law conflicts, *see* 42 U.S.C.

[10] In most cases, a court would probably find no jurisdiction over a foreign employer's extraterritorial practices, or would decline to exercise jurisdiction, based on the same principles of international law discussed in my panel dissent. *See Boureslan*, 857 F.2d at 1025-31. The only question before this en banc court, however, is whether Title VII's protections apply to a United States citizen employed abroad by an American employer.

§§ 2000e-5(c), (d), (e), arguing that "[i]f Congress had intended the Act to apply in foreign countries, we would expect Congress to have been even more careful to address conflicts with foreign discrimination laws." Looking again to the amended ADEA, which contains a similar federal-state relationship clause, 29 U.S.C. § 633, I note that Congress saw no need to add a provision addressing conflicts with overlapping foreign laws that prohibit discrimination in employment when Congress provided for the ADEA's extraterritorial scope. Congress did, however, amend the ADEA's "BFOQ" provision, specifying that actions otherwise prohibited under the Act shall not be unlawful if compliance with the ADEA's provisions "would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located." 29 U.S.C. § 623(f)(1). This circuit has already interpreted the BFOQ provision of Title VII in this fashion. *Kern v. Dynalectron Corp.*, 577 F.Supp. 1196 (N.D. Tex. 1983) (assuming without addressing the extraterritorial coverage of Title VII), *aff'd on basis of district court opinion*, 746 F.2d 810 (5th Cir. 1984).[11]

The majority finds it curious that Congress made no special provisions in Title VII either for the venue of cases arising from extraterritorial violations or for the investigatory powers of the Equal Employment

[11] In *Kern*, a United States helicopter company required all its pilots who flew from Jeddah to Mecca, Saudi Arabia, to be Moslem. The defendant company argued that religion was a bona fide occupational qualification because Saudi law prohibited non-Moslems from entering the holy area of Mecca under penalty of death. We affirmed the district court's finding that the employer had not violated Title VII.

Oppportunity Commission ("EEOC") in such cases. First, Title VII provides for venue not only in the district in which the violation was committed, but also in either the district where relevant employment records are administered, or the district where the aggrieved employee would have worked but for the unlawful employment practice. 42 U.S.C. § 2000e-5(f)(3). Venue in one of the latter two districts would usually be available in the situation—certainly not uncommon—involving the temporary foreign assignment of an employee advancing on the corporate track of an American multinational corporation. In addition, Title VII provides that if an employer is not "found" within any of the first three specified districts, venue is proper "in the judicial district in which the respondent has his principal office." *Id.* An American enterprise will generally have a principal office in the United States.[12]

Second, the geographical limitations on the EEOC's investigative powers—in both the original Act and in the 1972 amendments—apply only to the EEOC's power to *compel* compliance with administrative procedures. *See* 42 U.S.C. § 2000e-9 (incorporating 29 U.S.C. § 161, which allows the EEOC to compel the appearance of witnesses and the production of documents from anywhere within the United States or its territories). There is nothing in Title VII that precludes the EEOC from attempting to obtain the employer's voluntary cooperation in investigation and

[12] It is not necessary for purposes of this appeal to delineate the circumstances under which an American parent corporation will exercise sufficient control over its foreign subsidiary so that the enterprise will constitute an American employer.

conciliation efforts.[13] It would be unreasonable [sic*] for Congress to conclude that United States citizens are entitled to the protections of Title VII abroad, but to decline to authorize the EEOC to expend the time or resources necessary to compel compliance with an investigation of a case in which documents and witnesses are located in other countries. Furthermore, American enterprises likely maintain records in their home offices as well as abroad, or exercise sufficient control over their foreign operations to request the production of witnesses and documents through internal channels. Thus, the EEOC clearly has the power to subpoena the home office for evidence necessary to an investigation.

The majority finally cites the ADEA as a good example for the proposition that Congress knows how to give extraterritorial effect to a statute when it desires to do so. What the majority fails to mention is that at the time Congress amended the ADEA, courts had consistently held that the ADEA did not apply extraterritorially. *See e.g., Cleary v. United States Lines, Inc.*, 728 F.2d 607 (3d Cir.1984); *Zahourek v. Arthur Young & Co.*, 567 F.Supp. 1453 (D.Colo.1983), *aff'd*, 750 F.2d 827 (10th Cir.1984). These cases had distinguished the ADEA from Title VII because the ADEA incorporates the geographic

[13] The ADEA, unlike Title VII, incorporates the enforcement provisions of the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* Under the relevant provision in the ADEA, the EEOC's enforcement powers extend *only* to cooperation with state agencies and voluntary conciliation attempts. *See* 29 U.S.C. § 626. Congress left the EEOC enforcement provisions of the ADEA unchanged when it explicitly provided for extraterritorial application of the ADEA in 1984.

* In the slip opinion, the word used was "reasonable." Based upon the context, we believe "reasonable" was intended.

restrictions of the Fair Labor Standards Act,[14] which Title VII does not, and contains no alien exemption clause such as is found in section 702 of Title VII. *See Cleary*, 728 F.2d at 609; *Zahourek*, 567 F.Supp. at 1456; *see also Pfeiffer v. Wm. Wrigley Jr., Co.*, 755 F.2d 554, 559 (7th Cir.1985). Every court previously faced with the issue of Title VII's scope either had concluded that the alien exemption provision evidenced an intent to apply the Act extraterritorially, or had simply assumed jurisdiction without discussion. *See Bryant v. International Schools Serv., Inc.*, 502 F.Supp. 472 (D.N.J.1980), *rev'd on other grounds*, 675 F.2d 652, 577 n. 23 (3d Cir.1982); *Seville v. Martin Marietta Corp.*, 638 F.Supp. 590 (D.Md.1986) (adopting *Bryant's* reasoning); *Love v. Pullman Co.*, 13 Fair Empl.Prac.Cas. (BNA) 423, 426 n. 4 (D.Colo.1976), *aff'd on other grounds*, 569 F.2d 1074 (10th Cir.1978).

In amending the ADEA, Congress also had before it the testimony of the EEOC that Title VII applied abroad. *See Age Discrimination and Overseas Americans, 1983: Hearing Before the Subcomm. on Aging of the Senate Comm. on Labor and Human Resources*, 98th Cong., 1st Sess. 3 (1983). Senator Charles Grassley, Chairman of the Subcommittee on Aging of the Committee on Labor and Human Resources, and sponsor of the bill extending the ADEA to citizens employed abroad, stated when he introduced the ADEA amendment that legislation was necessary to correct the unintended "anomaly" of applying the ADEA only domestically, while Title VII was ap-

[14] Section 626(b) of the ADEA incorporates 29 U.S.C. § 213(f) of the Fair Labor Standards Act, which excludes "any employee whose services during the workweek are performed in a workplace within a foreign country."

plied both home and abroad. 129 Cong.Rec. S17,018 (daily ed. Nov. 18, 1983). Thus, there is every indication that when Congress amended the ADEA in 1984, it intended simply to make the scope of the Act coextensive with that of Title VII.[15] It would otherwise seem anomalous that Congress would desire the elimination of extraterritorial workplace discrimination based only on an employee's age, and not on an employee's race, color, religion, sex, or national origin —categories that have traditionally enjoyed heightened constitutional scrutiny and great legislative concern as impediments to equal opportunities.

International Law

In his panel majority opinion, Judge Davis rejects the evidence of congressional intent to apply Title VII extraterritorially as inadequate, referring to policy considerations—including religious and cultural differences with other nations—that purportedly militate against such an application of the statute. *See Boureslan*, 857 F.2d at 1020. Unless, however, the conflicts of law to which the majority refers rise to the level of a violation of international law, they are not a sufficient basis on which to reject categorically the clear evidence of congressional intent existing in this case.

As I explained in my panel dissent, extraterritorial application of Title VII would not violate international law. *See id.* at 1024-31. I will not here repeat

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[15] See also the report of the Committee on Labor and Human Resources, which describes the amendment of the ADEA to provide for extraterritorial coverage of United States citizens as a "minor change[]" in the Act. S.Rep. No. 98-467, 98th Cong., 2d Sess. 2 (1984), *reprinted in* 1984 U.S.Code Cong. & Ad.News 2974, 2975.

that lengthy discussion. Briefly, applying the test set forth in section 403 of the Restatement (Third) of Foreign Relations Law, it clearly is not unreasonable for the United States to require that American companies comply with Title VII in their employment of United States citizens in other countries: The United States has a strong and legitimate interest in protecting citizens employed abroad by American corporations from discrimination in employment; Title VII is consistent with the norms of the international community, which has adopted numerous accords condemning discrimination, including discrimination in employment; American citizens have a legitimate expectation that they will not lose the protection of Title VII when they accept a position with the foreign office of an American enterprise; and the potential for conflicts with foreign law are minimized by the fact that the statute applies only to United States nationals and by the BFOQ defense that has been interpreted in an opinion endorsed by this court to exempt an employer from liability where a violation of Title VII is compelled by foreign law. *See Kern*, 577 F.Supp. at 1201.

This is not to say that the exercise of extraterritorial jurisdiction under Title VII would be appropriate in every case. However, the fact that we can hypothesize situations in which a conflict would arise does not mean that the statute must be construed so that it *never* applies abroad. "Because Congress . . . can neither anticipate nor resolve all conflicts with foreign jurisdiction," it necessarily relies upon the judiciary to minimize conflicts of jurisdiction by exercising a jurisdictional rule of reason in individual cases. *Laker Airways*, 731 F.2d at 952 n. 169. The Restatement does not purport to eliminate concur-

rent jurisdiction. Rather, it recognizes that two or more states may exercise jurisdiction over the same activities or individuals when the exercise of jurisdiction by each state is reasonable. The Restatement provides mechanisms for courts to moderate the exercise of jurisdiction when conflicts do arise. This is a process that most courts of appeals, including this one, have employed in other cases involving extraterritorial application of United States law. *See, e.g., American Rice*, 701 F.2d at 414.

The concern voiced by the majority—that extraterritorial application of Title VII will create conflicts of law—is, thus, adequately addressed by the provisions of the statute itself and by the same principles of international law that have traditionally allowed United States courts to moderate their exercise of extraterritorial jurisdiction in the case of actual conflicts of law.

Conclusion

In enacting Title VII of the Civil Rights Act of 1964, Congress expressed its determination that all Americans are entitled to be free of the intolerable barrier of discrimination in employment based on race, color, religion, sex or national origin. Under the majority's holding, however, Congress's commitment represents merely an empty promise to the thousands of American women and minorities employed in other countries by American multinational firms. Such individuals face the dilemma of accepting an assignment abroad, often considered to be a lucrative opportunity and, in many such multinational enterprises, a prerequisite for career advancement at home, only at the cost of relinquishing the protections and remedies of Title VII upon crossing the territorial borders of the United States. Employment

discrimination by American employers against American citizens—wherever practiced—has devastating effects both on the economy of this country and on the dignity and livelihoods of Americans who have come to rely over the past quarter of a century on achievements made possible, in part, by civil rights legislation. The salutary goals of Title VII cannot be fully realized if the fortuitous location of an American employee at the overseas office of an American firm could mean the difference between equal opportunity and discrimination at will.

Congress certainly recognized the potential for abuse represented by American multinational concerns when it enacted Title VII, which must explain its inclusion of section 702 of the Act, the alien exemption clause. Balancing the broad remedial goals of this civil rights statute against the potential conflicts that would arise in attempting to regulate the employment of aliens outside the United States, Congress followed the reasoning of the Supreme Court in *Foley Bros.* and drew an extraterritorial line based on nationality.

There is no justification for disregarding the clear evidence of congressional intent to apply Title VII to United States citizens employed in other countries by American enterprises. Congress made the judgment in 1964 in Title VII, just as it did again in 1984 in the ADEA amendments, that American nationals employed by United States employers are entitled to the same protection from employment discrimination abroad as they enjoy at home. If we are not to substitute our policy judgments for those of Congress, we must give effect to Congress's intent to apply Title VII extraterritorially. I respectfully dissent from the majority's refusal to do so.

APPENDIX B

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 87-2206

ALI BOURESLAN, PLAINTIFF-APPELLANT,

v.

ARAMCO, ARABIAN AMERICAN OIL COMPANY and ARAMCO SERVICE COMPANY, DEFENDANTS-APPELLEES.

Oct. 17, 1988

Before KING* and DAVIS, Circuit Judges, and PARKER,** District Judge.

W. EUGENE DAVIS, Circuit Judge:

Plaintiff, a naturalized citizen of the United States, brought an employment discrimination suit—predicated upon Title VII and state law causes of action—against his employer, a United States corporation whose principal place of business is in Saudi Arabia. In his suit, plaintiff charged that while he was working in Saudi Arabia, his employer discriminated against him on the basis of his race, religion, and national origin. The employer contested plaintiff's claims of discrimination and, in addition, moved the

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* Formerly Judge Randall.

** District Judge of the Eastern District of Texas, sitting by designation.

district court to dismiss the entire action. The employer argued that the reach of Title VII does not extend to United States citizens employed abroad by United States employers and, therefore, that the district court lacked subject matter jurisdiction over plaintiff's claim. The district court agreed, granted the employer's motion, and dismissed plaintiff's suit. On appeal, plaintiff—joined by the Equal Employment Opportunity Commission as *amicus curiae*—urges us to conclude, that Congress intended Title VII to apply extraterritorially to protect United States citizens employed by United States employers. We find, however, that the rules of statutory construction which control our review of Title VII do not permit the conclusion plaintiff urges—we cannot say that Congress, through either the language of Title VII or its legislative history, clearly expressed its intent that Title VII be applied extraterritorially. Therefore, we conclude that Title VII does not offer plaintiff an available remedy for his claimed discrimination and affirm the district court.

I.

This appeal presents a single issue: Does Title VII regulate the employment practices of businesses which, although incorporated in the United States, employ citizens of the United States in foreign countries? The question reaches us as a result of the employment relationship between Ali Boureslan, Arabian American Oil Company (Aramco), and Aramco Services Company (ASC). In 1979, Boureslan—a naturalized United States citizen who was born in Lebanon—went to work as an engineer for ASC in Houston, Texas. ASC is a Delaware corporation with its principal place of business in Houston;

ASC is a subsidiary of Aramco, licensed to do business in Texas, with its principal place of business in Dhahran, Saudi Arabia. In November 1980, Boureslan requested a transfer to Aramco. Because Aramco explores, produces, and refines oil and gas exclusively within the Kingdom of Saudi Arabia, Boureslan's transfer from ASC to Aramco also meant a transfer from the United States to Saudi Arabia.

Shortly after beginning work in Saudi Arabia, Boureslan began having altercations with his supervisor. According to Bourleslan, the altercations were the result of a "campaign of harassment" which the supervisor initiated—a campaign which took the form of racial, religious, and ethnic slurs and which culminated in Boureslan's termination on June 16, 1984.

After he was fired, Boureslan first filed charges against Aramco with the Equal Employment Opportunity Commission (EEOC) in the United States and, later, instituted this suit against both Aramco and ASC in the United States District Court for the Southern District of Texas. In each case, the focus of Boureslan's attack was the discriminatory treatment which he allegedly received while in Saudi Arabia from his Aramco supervisor. In his lawsuit, Bourleslan sought relief under both Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and state law. In response to the lawsuit, both Aramco and ASC filed answers denying liability and separately filed motions to dismiss for lack of subject matter jurisdiction. ASC stressed two reasons why Boureslan's claims against ASC should be dismissed. First, ASC argued that, at most, only Aramco could be liable to Boureslan since, according to ASC, Boureslan's transfer from ASC to Aramco terminated the employment relationship between ASC and

Boureslan. Second, ASC argued that Boureslan failed properly to exhaust his administrative remedies under Title VII with respect to ASC because Boureslan named only Aramco in the one grievance he filed with the EEOC.

While ASC's grounds for dismissal challenged only the propriety of its own inclusion in Boureslan's lawsuit, Aramco's motion to dismiss raised a more sweeping challenge—a challenge which, if true, required a dismissal of the lawsuit against both Aramco and ASC. Aramco argued that the protections of Title VII do not extend extraterritorially and, consequently, that Title VII offers no protection to Boureslan for acts of discrimination which occurred in Saudia Arabia. Boureslan contested this interpretation, and argued that the clear and express terms of Title VII demonstrate Congress' intent to protect United States citizens from employment discrimination by American employers regardless of where the discrimination occurs. In an opinion dated January 27, 1987, the district court considered carefully the question of Title VII's geographic reach. After examining Title VII's language and legislative history, Supreme Court cases on extraterritorial application of federal statutes, and other existing case law on the scope of Title VII, the district court concluded that Title VII does not afford extraterritorial protection. *Boureslan v. Aramco*, 653 F.Supp. 629, 631 (S.D. Tex.1987). Consequently, the court dismissed Boureslan's Title VII action against Aramco and ASC for lack of subject matter jurisdiction; it also dismissed Boureslan's state law claims for lack of pendent jurisdiction, and entered final judgment in favor of both defendants. On appeal, Boureslan asks us to find that Congress intended Title VII to be applied extraterritorially.

II.

A special set of rules of statutory interpretation are in place to assist us in determining whether Congress intended to give a statute application outside this country. We first examine those rules.

In *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 69 S.Ct. 575, 93 L.Ed. 680 (1949), the Supreme Court considered whether a federal statute prohibiting workdays of longer than eight hours without overtime pay applied to a contract between the United States and a private contractor for work performed in a foreign country. *Id.* at 282, 69 S.Ct. at 576. As the Court saw it:

> The canon on construction which teaches that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States, is a valid approach whereby unexpressed congressional intent may be ascertained. It is based on the assumption that Congress is primarily concerned with domestic conditions. We find nothing in the Act itself, as amended, nor in the legislative history, which would lead to the belief that Congress entertained any intention other than the normal one in this case.

Id. at 285, 69 S.Ct. at 577 (citation omitted).

See also McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 21-22, 83 S.Ct. 671, 677-78, 9 L.Ed.2d 547 (1963).

This court has consistently applied the presumption against extraterritoriality. In *United States v. Mitchell*, 553 F.2d 996 (5th Cir.1977), we refused to read extraterritorial application into the Marine Mammal Protection Act. In ruling against extraterritorial application, we noted that "the government [failed] to [show] any clear expression of congressional intent [to overcome the presumption against extraterritorial application]." In *De Yoreo v. Bell Helicopter Textron, Inc.*, 785 F.2d 1282, 1283 (5th Cir.1986), we rejected the argument that the Age Discrimination In Employment Act (ADEA) be given extraterritorial application.

Other circuits have followed the Supreme Court in denying extraterritorial application without a clear congressional expression of intent to the contrary. For example, in *Pfeiffer v. Wm. Wrigley, Jr. Co.*, 755 F.2d 554 (7th Cir.1985), the Seventh Circuit considered the extraterritorial application of the ADEA. After finding that the statute did not speak directly to the issue of extraterritorial application, the court applied the presumption against extraterritorial application, noting that "[t]he fear of outright collisions between domestic and foreign law—collisions both hard on the people caught in the cross-fire and a potential source of friction between the United States and foreign countries—lies behind the presumption against extraterritorial application of federal statutes." *Id.* at 557. Likewise in *Cleary v. United States Lines, Inc.*, 728 F.2d 607 (3d Cir. 1984), the Third Circuit rejected the application of the ADEA extraterritorially without "affirmative evidence of congressional intent." *See also Air Line Stewards and Stewardesses Ass'n Int'l v. Trans World Airlines, Inc.*, 273 F.2d 69, 70 (2d Cir.1959), *cert. denied*, 362 U.S. 988, 80 S.Ct. 1075, 4 L.Ed.2d 1021 (1960) (denying extraterritorial application of the Railway Labor Act (RLA)); *Air Line Stewards and Stewardesses Ass'n Int'l v. Northwest Airlines,*

Inc., 267 F.2d 170, 178 (8th Cir.), *cert. denied*, 361 U.S. 901, 80 S.Ct. 208, 4 L.Ed.2d 156 (1959) (denying extraterritorial application of RLA); *Air Line Dispatchers Ass'n v. National Mediation Bd.*, 189 F.2d 685, 690-91 (D.C.Cir.), *cert. denied*, 342 U.S. 849, 72 S.Ct. 77, 96 L.Ed. 641 (1951) (denying extraterritorial application of RLA); *see generally* Restatement (Second) of the Foreign Relations Law of the United States § 38 (1965).

Against this backdrop, we examine the language and legislative history of Title VII to determine whether Congress intended the act to have extraterritorial application.

III.

A.

Boureslan's discrimination case is based upon § 703(a)(1) of Title VII which provides:

> It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a)(1).

Extraterritorial application is not directly addressed in Title VII. Section 2000e(b) defines "employer" under the Act as including any "person employed in an industry affecting commerce." The term "commerce" is in turn defined as "trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof." 42 U.S.C. § 2000e(g).

Boureslan, however, relies on § 2000e-1 commonly referred to as the alien exemption provision, which provides that "[t]his title shall not apply to an employer with respect to employment of aliens outside of any state."[1] Boureslan argues that a "negative inference" should be drawn from this language that Congress intended Title VII to cover United States citizens working abroad for United States employers. Boureslan argues that the alien exemption provision has no purpose if Title VII is not applied to protect citizens extraterritorially because in the absence of this provision neither citizens nor aliens would be protected while working outside the country. Boureslan notes that one district court has accepted this argument. *Bryant v. International School Servs.*, 502 F. Supp. 472 (D.N.J.1980), *rev'd on other grounds*, 675 F.2d 562 (3d Cir.1982).

But the alien exemption provision does have a purpose even if we accept the district court's conclusion

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[1] Eight years after the enactment of Title VII, Congress added the following language to extend protection of the Act to federal employees, and included the alien exemption language:

> All personnel actions affecting employees or applicants for employment (*except with regard to aliens employed outside the limits of the United States*) in military departments . . . , in executive agencies . . . , in the United States Postal Service and the Postal Rate Commission, in those units of the government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin. (emphasis added).

42 U.S.C. § 2000e-16(a).

that Title VII does not protect citizens abroad. First, no one disputes that the provision excludes coverage to aliens employed outside the states. Second, in *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 95, 94 S.Ct. 334, 340, 38 L.Ed.2d 287 (1973), the Supreme Court attached another meaning to the provision's domestic scope. The Court concluded that the alien exemption provision reflects a congressional intent to provide Title VII coverage to aliens employed *within* the United States.

Thus, we do not face a choice between attaching appellant's negative inference to the alien exemption provision or stripping the provision of all purpose. If we decline to give the alien exemption provision the interpretation appellant seeks, the provision still is a meaningful and useful part of the Act. Appellant has not persuaded us that the provision's language merits an interpretation against extraterritorial application of the Act.

Boureslan argues next that the legislative history of Title VII, when coupled with the statutory language, evidences a clear congressional intent to apply the Act extraterritorially. It is to the legislative history, therefore, that we must now turn.

B.

Before considering the particular portions of the legislative history pointed to by Boureslan, it is important that we define the role allocated to legislative history in statutory interpretation. Legislative history is relegated to a secondary source behind the language of the statute in determining congressional intent; even in its secondary role legislative history must be used "cautiously." *United States v. Smith*, 795 F.2d 841 (9th Cir.1986). Courts are not free to

substitute legislative history for the language of the Act and legislative history is not an adequate substitute for congressional action. *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1, 97 S.Ct. 926, 5 L.Ed.2d 124 (1977); *United States v. Devall*, 704 F.2d 1513 (11th Cir. 1983); *Aronsen v. Crown Zellerbach*, 662 F.2d 584 (9th Cir. 1981), *cert. denied*, 459 U.S. 1200, 113 S.Ct. 1183, 75 L.Ed.2d 431 (1983). The Supreme Court has repeatedly stated that "'[a]bsent a clearly expressed legislative intention to the contrary, [statutory] language must ordinarily be regarded as conclusive.'" *Escondido Mut. Water Co. v. La Jolla Indians*, 466 U.S. 765, 772, 104 S.Ct. 2105, 2110, 80 L.Ed.2d 753 (1984) (quoting *North Dakota v. United States*, 460 U.S. 300, 312, 103 S.Ct. 1095, 1102, 75 L.Ed.2d 77 (1983); *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 100 S.Ct. 2051, 64 L.Ed.2d 766 (1980).

The EEOC in its amicus curiae brief points to three statements in the legislative history that, it argues, supports its interpretation of the Act. First, the EEOC notes that in the House report that accompanied the Act to the Senate floor, the passage of Title VII was declared necessary:

> [t]o remove obstructions to the free flow of interstate commerce and to insure the complete and full enjoyment by all persons of the rights, privileges, and immunities secured and protected by the Constitution.

House Report on Civil Rights Act of 1964, H.R.Rep. No. 914, 88th Cong., 1st Sess. (1963), reported in 1964 U.S.Cong. Code & Admin.News 2391, 2402. Second, EEOC stresses a comment by Representative William McCulloch, ranking minority member of the House Judiciary Committee, in which McCulloch

stated that "[a] key purpose of the bill, then, is to secure to all Americans the equal protection of the laws of the United States and of the several states." *Id.*, reprinted in 1964 U.S.Cong. Code & Admin.News at 2488. EEOC also points out that the minority report states that "[t]he rights of citizenship mean little if an individual is unable to gain the economic wherewithall to enjoy or properly use them." *Id.* at 2516. The EEOC argues that these general policy statements reflect a strong intent by Congress to combat employment discrimination on all fronts without any geographic limits. Thus, the EEOC asserts that the omission of any mention of extraterritorial applicaton supports, rather than detracts, from their position.[2]

These references to Title VII's legislative history fall far short of the clear expression of congressional intent required to overcome the presumption against extraterritorial application. The statements, carefully taken from a voluminous legislative history, are no more specific than the statutory language itself. To rely on such general policy statements would effectively adopt a presumption in favor of extraterritorial application. This is particularly true when the legis-

[2] In *Espinoza*, 414 U.S. at 94, 94 S.Ct. at 339, the Court noted that the EEOC's interpretation of Title VII is generally entitled to deference. However, such interpretations are not controlling on the courts. Because this is a jurisdictional issue with little or no statutory language or legislative history, and one in which the EEOC has developed no particular expertise, we give the EEOC's interpretation less deference than usual. This is particularly appropriate given the traditional presumption against extraterritoriality. *See General Electric Co. v. Gilbert*, 429 U.S. 125, 141-42, 97 S.Ct. 401, 410-11, 50 L.Ed.2d 343 (1976); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S.Ct. 161, 164, 89 I.Ed. 124 (1944).

lative history contains numerous statements that arguably favor geographic limits for Title VII.

For example, the Act's language and legislative history make repeated references to the "United States," "states," and procedures relating to state proceedings without parallel references to foreign countries. 42 U.S.C. 2000e(i) defines "state" to include the states and other areas under United States jurisdiction, with no reference to foreign countries. References in the legislative history highlight concerns about employment discrimination problems in the states, Senator Hubert Humphrey, 110 Cong. Rec. 6550 (1964); the effect of Title VII on southern states versus other states, Senator Richard Russell, 110 Cong.Rec. 14301 (1964); and deferral to state employment laws, Congressman Emanuel Celler, 110 Cong.Rec. 1521 (1964).

Moreover, Congress deleted reference to "foreign commerce" and "foreign nations" from earlier House versions of Title VII.[3] While these references and deletions are not conclusive legislative support, they are certainly as persuasive as policy statements in the legislative history offered by the EEOC.

EEOC also points to a reference in the alien exemption provision contained in a house report rendered in connection with H.R. 405, a concurrent attempt to fashion equal employment legislation during the 88th Congress' first session in 1963. This report was placed in the record in the hearings for H.R. 7152,

[3] These deletions are reflected in an annotated copy of the House bill that Senator Dirksen inserted into the Congressional Record on June 5, 1964, an anticipation of debate on the Senate's substitute bill. Senator Everett Dirksen, 110 Cong.Rec. 12811-817 (1964).

which ultimately became the Civil Rights Act of 1963. The report stated,

> In section 4 of the Act, limited exception is provided for employers with respect to employment of aliens outside of any state, and also, to any religious corporations, associations, or societies. The intent of the first exemption is to remove conflicts of law which might otherwise exist between the United States and a foreign nation in the employment of aliens outside the United States by an American enterprise.

Civil Rights: Hearings on H.R. 7152, as amended by Subcommittee No. 5 before the House Committee on the Judiciary, 88th Cong., 1st Sess. 2303 (1963). EEOC urges us to interpret this language to reflect an intent that, but for the alien exemption provision, Title VII protects all persons employed overseas by American employers.

However, this brief reference sheds little additional light on the issue. Whether it points to the provision's bare language or to this snippet of legislative history, EEOC still must argue a negative inference. That is, EEOC argues that Congress spoke by not speaking. This silence will not reverse the presumption that this legislation applies only to employees employed in the United States.[4]

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[4] The colloborative [*sic*] nature of the way in which H.R. 405 found its way into H.R. 7152 further dilutes the report's impact. The General Subcommittee on Labor voted on June 20, 1963, to report H.R. 405 to the full Committee on Education and Labor. On July 31, 1963, Subcommittee No. 5 of the House Committee on the Judiciary placed this report in the record of hearings on H.R. 7152, the administration's civil rights bill. Subcommittee No. 5 substituted H.R. 405 for the equal employment title originally proposed in H.R. 7152, and reported H.R. 7152 favorably to the full judiciary committee. The full committee retained the alien exemption provision when it reported the title on Nov. 20, 1963. Ultimately, Congress enacted H.R. 7152 as the Civil Rights Act of 1963. In short, EEOC looks for a clear expression of intention in a negative inference arising from one paragraph of a report rendered by members of a House subcommittee that did not participate in voting the bill out of the Judiciary Committee and sending it to the full House.

Finally, Boureslan and the EEOC advance a number of policy arguments in favor of the extraterritorial application of Title VII. These arguments go to the inequity of denying Americans employed abroad protections to which they are entitled in the United States. Although these arguments have obvious appeal, we cannot ignore strong countervailing policy arguments against the application of Title VII abroad. The religious and social customs practiced in many countries are wholly at odds with those of this country. Requiring American employers to comply with Title VII in such a country could well leave American corporations the difficult choice of either refusing to employ United States citizens in the country or discontinuing business. Given the serious, potentially devisive [*sic*] policy considerations for and against application of the Act outside the country, the paucity of reference to such an application either in the Act itself or the debates in Congress is a compelling argument that Congress did not turn its attention to this possibility. It is not for this court to decide this policy issue for the legislative branch.

> While the judicial function in construing legislation is not a mechanical process from which judgment is excluded, it is nevertheless very different from the legislative function. Construction is not

legislation and must avoid "that retrospective expansion of meaning which properly deserves the stigma of judicial legislation." To blur the distinctive functions of the legislative and the judicial processes is not conductive to responsible legislation.

Addison v. Holly Hill Fruit Prods. Co., 322 U.S. 607, 618, 64 S.Ct. 1215, 1221, 88 L.Ed. 1488 (1944) (citation omitted).

IV.

The presumption against extraterritorial application establishes a high hurdle for appellant's arguments to overcome. Neither the statute's bare language nor the sparce [*sic*] indirect language on the subject in the legislative history persuade us that he has cleared this hurdle.

AFFIRMED.

KING, Circuit Judge, dissenting:

Today, in the first circuit court opinion to consider expressly the extraterritorial application of Title VII,[1] the majority holds that Title VII affords no protection

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[1] Every district court that has considered the question has held that Title VII does apply extraterritorially. *Bryant v. International Schools Services, Inc.*, 502 F.Supp. 472 (D.N.J. 1980), *rev'd on other grounds*, 675 F.2d 562, 577 n. 23 (3d Cir.1982) (declining to reach question of Title VII's extraterritorial application); *Seville v. Martin Marietta Corp.*, 638 F.Supp. 590 (D.Md.1986) (adopting *Bryant's* reasoning); *Love v. Pullman*, 13 Fair Empl.Prac.Cas. (BNA) 423, 426 n. 4 (D.Colo.1976), *aff'd on other grounds*, 569 F.2d 1074 (10th Cir.1978); *see also Kern v. Dynaelectron*, 577 F.Supp. 1196 (N.D.Tex.1983) (applying Title VII extraterritorially without expressly considering threshold jurisdictional issue), *aff'd mem.*, 746 F.2d 810 (5th Cir.1984).

from employment discrimination to U.S. citizens who are employed abroad by U.S. corporations. Because an examination of the language and legislative history of Title VII reveals that Congress did not intend the protections of Title VII to be so restricted, and because the extraterritorial application of Title VII to U.S. nationals would not violate principles of international law, I must respectfully dissent from the majority's holding.

I. The Presumption Against Extraterritoriality

It is undisputed that Congress had the power to extend Title VII's protections extraterritorially. *See Steele v. Bulova Watch Co.*, 344 U.S. 280, 282-83, 73 S.Ct. 252, 253-54, 97 L.Ed. 319 (1952); *Foley Bros. v. Filardo*, 336 U.S. 281, 284, 69 S.Ct. 575, 577, 93 L.Ed. 680 (1949); *United States v. Mitchell*, 553 F.2d 996, 1001 (5th Cir.1977). Nationality is an accepted basis for the exercise of jurisdiction. Thus, a state may prescribe law relating to the conduct of its nationals, even when that conduct occurs outside of the state's territory. *See Steele*, 344 U.S. at 285-86, 73 S.Ct. at 255-56; *Blackmer v. United States*, 284 U.S. 421, 436-37, 52 S.Ct. 252 254-55, 76 L.Ed. 375 (1932); *Mitchell*, 553 F.2d at 1001; *Laker Airways v. Sabena, Belgian World Airlines*, 731 F.2d 909, 922 (D.C.Cir.1984); Restatement (Third) of the Foreign Relations Law of the United States § 402 (1987) [hereinafter Restatement]. The only question in this case is whether Congress exercised that power.

The majority correctly notes that because jurisdiction to prescribe is ordinarily exercised on the basis

of territory rather than nationality,[3] there is a presumption that Congress intends legislation to apply only within the territorial jurisdiction of the United States, unless a contrary intent appears. *Steele*, 344 U.S. at 285, 73 S.Ct. at 255; *Foley Bros.*, 336 U.S. at 285, 69 S.Ct. at 577-78; *Blackmer*, 284 U.S. at 437, 52 S.Ct. at 254-55; *Mitchell*, 553 F.2d at 1002. The majority goes astray, however, in its determination of what constitutes an expression of "contrary intent" sufficient to overcome the presumption.

As will be demonstrated more fully below, this is not a case in which the claim of extraterritorial jurisdiction is based solely on the broad jurisdictional language of the statute. Rather, the conclusion that Title VII was intended to apply to U.S. citizens employed abroad by U.S. corporations is compelled by canons of statutory construction and is further supported by legislative history. In rejecting these traditional methods of statutory interpretation as inadequate, the majority implies that nothing short of an explicit statement by Congress will overcome the presumption.

The classic formulation of the presumption, however, does not impose such a stringent standard: "The canon of construction which teaches that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States . . . is a valid approach whereby *unexpressed* congressional intent may be ascertained." *Foley Bros.*, 336 U.S. at 285, 69 S.Ct. at 577 (emphasis added) (citation omitted); *Natural Resources*

[3] Territory and nationality are the two universally recognized bases for a state's exercise of jurisdiction to prescribe law. Restatement § 402 comment a (also noting that these links may not be sufficient in all cases). Territoriality, however, "is considered the normal, and nationality an exceptional, basis for the exercise of jurisdiction." *Id.* comment b.

Defense Council v. Nuclear Regulatory Comm'n, 647 F.2d 1345, 1357 n. 54 (D.C.Cir.1981). The most established method of ascertaining unexpressed congressional intent is to apply principles of statutory construction, and to refer to the legislative history of the act. *See* N. Singer, 2A Sutherland Statutory Construction §§ 45.12, 48.06 (1984). Nothing in this formulation indicates that a "contrary intent" sufficient to overcome the presumption against extraterritoriality may not be determined according to these ordinary methods.

Even if we add the adjective "clear" to our formulation of the presumption, *Mitchell*, 553 F.2d at 1002,[3] "clear" does not mean "express," and there is no reason why a "clear" intent to apply a statute extraterritorially may not be determined with reference to the rules of statutory construction, informed by legislative history. At most, requiring a "clear" expression of congressional intent may mean that the broad jurisdictional language of a statute is not sufficient in itself to support the exercise of extraterritorial jurisdiction. *See Mitchell*, 553 F.2d at 1003-04. It should be noted, however, that the Supreme Court *has* found such language sufficient to overcome the presumption.[4]

[3] Though *Mitchell* cites *Steele* and *Foley Bros.* as support for its formulation of the presumption, neither case requires that Congress' expression of "contrary intent" be "clear." 553 F.2d at 1002 (citing *Steele*, 344 U.S. at 285, 73 S.Ct. at 255, *Foley Bros.*, 336 U.S. at 285, 69 S.Ct. 577-78). For the purposes of this case, however, I recognize that we are bound by *Mitchell's* interpretation of these cases.

[4] In *Foley Bros.*, the Supreme Court held that such language was not sufficient to support extraterritorial jurisdiction. 336 U.S. at 287, 69 S.Ct. at 578-79. However, in *Steele*, decided three years later, the Court found that the broad jurisdictional

The extremely strong showing of congressional intent which the majority requires is clearly not compelled by the presumption itself. Rather, it appears that the majority has distorted the presumption in an effort to transform it into something it is not: a mechanism for evaluating potential conflicts of jurisdiction.[5] The majority concludes in effect that the policy implications of applying Title VII extraterritorially are so serious that we must require a more explicit statement by Congress that it intended Title VII to apply so broadly.

The majority's conclusion might be appropriate if Congress was, as the majority claims, silent on this subject. But Congress was not silent on the subject.

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language of the Lanham Act was sufficient to support the exercise of extraterritorial jurisdiction over U.S. nationals abroad. 344 U.S. at 286-87, 73 S.Ct. at 255-56.

In *Mitchell*, this court rejected the government's argument that use of the term "moratorium" in the Marine Mammal Protection Act, without reference to the geographic scope of the provision, indicated an intent by Congress to extend the moratorium against the taking of marine mammals world wide. 553 F.2d at 1003. Citing *Foley Bros.*, the court reasoned that such "all inclusive language" was not sufficient, by itself, to support extraterritorial jurisdiction. *Id.* at 1003-04.

[5] Quoting from *Pfeiffer v. Wm. Wrigley, Jr. Co.*, 755 F.2d 554 (7th Cir.1985), the majority maintains that the presumption arises from "[t]he fear of outright collisions between domestic and foreign law—collisions both hard on those caught in the cross-fire, and a potential source of friction between the United States and foreign countries."

It is true that by requiring a threshold showing of congressional intent, the presumption will in practice prevent unnecessary conflicts of law. Once that threshold showing has been established, however, we must turn to other mechanisms for resolving the conflicts of law that inevitably arise from the exercise of extraterritorial jurisdiction.

Rather, we have evidence that Congress did consider the implications of applying Title VII extraterritorially: Congress included in the statute a provision explicitly exempting aliens employed abroad by U.S. corporations *in order to avoid conflicts of law*. It follows logically that Congress believed that application of Title VII to U.S. citizens employed abroad by U.S. corporations would not present similar barriers to the exercise of extraterritorial jurisdiction.[6] In concluding that the statute should not apply to U.S. citizens employed abroad, the majority has therefore done precisely what it cautions against: It has substituted its own policy judgment for that of Congress.

The majority's intuition is correct that the implications of applying a statute extraterritorially *may* be such that the type of evidence presented in this case would not be sufficient to support the exercise of extraterritorial jurisdiction. For example, a greater showing of congressional intent would be required to support an exercise of extraterritorial jurisdiction that would violate international law. A statute may not be construed to violate international law unless Congress has, by an affirmative expression of its intent, required that construction. *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21-22, 83 S.Ct. 671, 677-78, 9 L.Ed.2d 547 (1963); *Weinberger v. Rossi*, 456 U.S. 25, 32, 102 S.Ct. 1510, 1515-16, 71 L.Ed.2d 715 (1982); *see also* Restatement § 114.[7]

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[6] This argument is advanced in more detail below.

[7] Although the majority cites *McCulloch* in its discussion of the presumption against extraterritoriality, *McCulloch* did not turn on the issue of extraterritorial jurisdiction. Indeed, the presumption against extraterritoriality is not even mentioned in the opinion. Rather, the Supreme Court in *McCul-*

This principle is a facet of the separate presumption that Congress does not intend to violate international law. *See* Restatement § 115 comment a ("It is generally assumed that Congress does not intend to repudiate an international obligation of the United States by nullifying a rule of international law or an international agreement as domestic law.").

The showing of congressional intent required to overcome the presumption that Congress does not in-

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Ioch found that application of the National Labor Relations Act to protect foreign seamen, employed on vessels registered under a foreign flag, would violate State Department policy, a Treaty with the Honduran government, and the established principle of international law that the internal affairs of a vessel are to be regulated according to "the law of the flag state." *Id.*, 372 U.S. at 20-21 & n. 12, 83 S.Ct. 677 n. 12. The Court held that absent "[t]he affirmative intention of Congress clearly expressed," the NLRA could not be construed to apply to foreign seamen employed aboard vessels registered under a foreign flag because such a construction would violate the law of nations. *Id.* at 21-22, 83 S.Ct. at 677-78.

The standard set forth in *McCulloch* is thus not an elaboration upon the presumption against extraterritoriality, but an application of the long-standing principle that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Id.*, *quoting The Charming Betsy*, 2 Cranch 64, 118, 2 L.Ed. 208 (1804)); *accord* Restatement section 114; *see also Rossi*, 456 U.S. at 32, 102 S.Ct. at 1515-16 (citing *McCulloch* for this proposition, and construing statute to avoid repudiation of several international agreements, absent affirmative expression of Congress requiring that construction).

McCulloch, therefore, stands for the proposition for which it is cited in the text: a statute may not be construed to violate international law unless Congress has, by an affirmative expression of its intent, required that construction. 372 U.S. at 21-22, 83 S.Ct. at 677-78; *Rossi*, 456 U.S. at 32, 102 S.Ct. at 1515-16.

tend to violate international law is much greater than that required to overcome the presumption against extraterritoriality. While the two presumptions are in some respects parallel, they should not be conflated because not every exercise of extraterritorial jurisdiction violates international law. A separate, more stringent standard is properly reserved for cases in which the exercise of jurisdiction, extraterritorial or otherwise, would violate international law.

By requiring a more explicit showing of congressional intent to apply Title VII extraterritorially—without discussing whether extraterritorial application of Title VII would violate international law—the majority has implicitly conflated the two standards and has therefore defeated congressional intent without sufficient justification.

While I agree with the majority that we must consider the foreign policy implications of construing a statute to apply extraterritorially, I do not believe that its approach to these issues is satisfactory. We should not defeat congressional intent to exercise extraterritorial jurisdiction without engaging in a more principled analysis of the implications of applying the statute extraterritorially.[8]

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[8] In suggesting that we evaluate these concerns, I do not propose that we overstep our judicial role by intruding on the realm of international affairs which is properly the province of the legislative and executive branches. I propose simply that if the evidence of congressional intent to apply Title VII extraterritorially is sufficient to overcome the (properly applied) presumption against extraterritoriality, we should give effect to that intent unless we are precluded by principles of international law from doing so. This undertaking is entirely consistent with our judicial role. *See* Restatement § 111(1)-(2) (International law is the law of the United States and within the judicial power of the United States.).

In order to evaluate the complex issues raised in this case, we need a finer set of analytic tools than those employed in the majority opinion. I therefore propose an alternative framework that will, I believe, provide a more satisfactory treatment of the issues in this case.

The starting point for our analysis in this case should be section 403 of the Restatement which provides that as a matter of international law "a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable." § 403(1)). The factors enumerated in the Restatement provide a framework within which we can evaluate in a principled fashion the implications of applying Title VII extraterritorially.[9] *See American Rice, Inc. v. Arkansas Rice Growers Cooperative Ass'n*, 701 F.2d 408 (5th Cir.1983) (applying elements similar to reasonableness test to determine whether exercise of extraterritorial jurisdiction under Lanham Act was appropriate).

Moreover, because section 403 is a principle of international law, a statute may not be construed to violate the principle absent an explicit, affirmative ex-

[9] The Supreme Court's language in *Steele* suggests such a two-pronged inquiry: "the United States is not debarred by any rule of international law from governing the conduct of its own citizens upon the high seas or even in foreign countries when the rights of other nations or their nationals are not infringed." 344 U.S. at 286, 73 S.Ct. at 255-56. Thus, if the rights of other nations or their nationals are not infringed, an act of Congress may be given the full geographic scope that Congress intended. The reasonableness inquiry is a means by which we can determine whether foreign rights or interests would be infringed such that extraterritorial application of a statute would be inappropriate.

pression of congressional intent compelling that construction. *See McCulloch*, 372 U.S. at 21-22, 83 S.Ct. at 677-78; *Rossi*, 456 U.S. at 32, 102 S.Ct. at 1515-16; Restatement § 403 comment g. Thus, a statute will not be applied extraterritorially where it would be unreasonable to do so, unless Congress has affirmatively required that it be so applied. If extraterritorial application of Title VII would be unreasonable, the majority's conclusion would be correct—because Congress has not *affirmatively* required that the statute be applied extraterritorially.

If, however, extraterritorial application of the statute would not be unreasonable, and therefore would not violate international law, the threshold level of congressional intent required to overcome the presumption against extraterritoriality will be sufficient to support the exercise of extraterritorial jurisdiction. As explained above, no express statement of Congress is required to overcome the presumption. *See Foley Bros.*, 336 U.S. at 285, 69 S.Ct. at 577-78. Rather, we may employ traditional methods of statutory interpretation to determine whether the language and legislative history of Title VII evidence a clear intent that the statute be applied extraterritorially.

This analysis will insure that we accord proper respect both to the sovereignty of other nations and to Congress' intent.

II. The "Jurisdictional Rule of Reason."

The showing of congressional intent necessary to support an exercise of extraterritorial jurisdiction depends in the first instance on whether that exercise of jurisdiction will violate international law. Before examining the language and legislative history of Title

VII, I will therefore consider whether extraterritorial application of Title VII would violate the principle of international law set forth in section 403 of the Restatement: "[A] state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable." [10] Restatement § 403(1). Although the majority does not address this issue in its opinion, ARAMCO and Amicus Curiae assert that extraterritorial application of Title VII would violate the "reasonableness" principle. ARAMCO's arguments are addressed in the discussion below.

It should be noted at the outset of this discussion that section 403 is couched in general terms; it does

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[10] Most courts have applied the "reasonableness" principle to consider whether it would be appropriate to moderate their own enforcement of a statute that has already been held to apply extraterritorially. *See, e.g., American Rice, Inc. v. Arkansas Rice Growers Cooperative Association*, 701 F.2d 408 (5th Cir.1983) (Lanham Act); *Laker Airways v. Sabena, Belgian World Airlines*, 731 F.2d 909 (D.C.Cir.1984) (Sherman Act). This was the approach endorsed by section 40 of the Second Restatement, the precursor of section 403.

The Third Restatement, however, asserts that section 403 is intended to be more than a principle of comity: "reasonableness is understood here . . . as an essential element in determining whether, as a matter of law, the state may exercise jurisdiction to prescribe." Restatement sec. 403 reporters' note 10.

No court has applied the reasonableness test as part of the threshold inquiry to determine whether a statute may, as a general matter, be applied extraterritorially. The Restatement, however, notes that the reasonableness test may serve the same purpose as the traditional tests for deciding whether a statute may be applied extraterritorially. *Id.* reporters' note 2.

not purport to eliminate all conflicts in the exercise of jurisdiction. *See* Restatement § 403 comment d ("Exercise of jurisdiction by more than one state may be reasonable—for example, when one state exercises jurisdiction on the basis of territory and the other on the basis of nationality."). Therefore, the possibility that a conflict with foreign law may arise in some cases does not render Congress' initial exercise of extraterritorial jurisdiction unreasonable. "Because Congress . . . can neither anticipate nor resolve all conflicts with foreign prescriptive jurisdictions," it necessarily relies on the Judiciary to minimize conflicts of jurisdiction by exercising a jurisdictional rule of reason in individual cases. *Laker Airways*, 731 F.2d at 952 n. 169 (citing *Extraterritoriality and Conflicts of Jurisdiction*, U.S. Department of State Current Policy Bulletin No. 481 at 4 (15 April 1983)). Our inquiry here is therefore whether to apply Title VII extraterritorially, not whether it would in all cases be reasonable.

Section 403(2) provides:

> Whether exercise of jurisdiction over a person or activity is unreasonable is determined by evaluating all relevant factors, including, where appropriate:
>
> (a) the link of the activity to the territory of the regulating state, *i.e.*, the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;
>
> (b) the connections, such as nationality, residence, or economic activity, between the regulating state and the activity to be regulated, or between that state and those whom the regulation is designed to protect;

(c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;

(d) the existence of justified expectations that might be protected or hurt by the regulation;

(e) the importance of the regulation to the international political, legal, or economic system;

(f) the extent to which the regulation is consistent with the traditions of the international system;

(g) the extent to which another state may have an interest in regulating the activity; and

(h) the likelihood of conflict with regulation by another state.

The arguments that extraterritorial application of Title VII would be unreasonable fall into two categories encompassing the factors listed above: First, since discrimination against U.S. citizens that occurs abroad has no domestic effects, U.S. interests are not sufficient to justify the exercise of extraterritorial jurisdiction. Second, because labor relations are a peculiarly domestic matter, it would be an affront to the sovereignty of other nations to apply Title VII extraterritorially.

The first contention mischaracterizes the purpose of Title VII and trivalizes the special nature of civil rights laws. The "effects" factor included in the Restatement is well-suited for economic regulation, but not for individual rights of the sort guaranteed by

Title VII. It is true that the purposes of Title VII were framed in part in economic terms,[11] but the 1964 Civil Rights Act, of which Title VII is a part, was also an effort to fulfill the long-postponed promise of equal rights embodied in the fourteenth amendment: [12] It was intended not only to remedy domestic economic ills, but to protect individuals from "the injustices and humiliations" of discrimination. H.R.Rep. No. 914, 88th Cong., 1st Sess. 2018 (1963).

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[11] The language regarding the economic effects of discrimination provides a basis for Congress' exercise of power under the Commerce Clause. *See Heart of Atlanta Motel v. United States*, 379 U.S. 241, 85 S.Ct. 348, 13 L.Ed.2d 258 (1964); *Katzenbach v. McClung*, 379 U.S. 294, 85 S.Ct. 377, 13 L.Ed.2d 290 (1964) (upholding Title II of the Civil Rights Act of 1964 as exercise of Congress' power under the Commerce Clause).

[12] This purpose is evident from the introductory language to the section which states that Title VII is necessary "[t]o remove obstructions to the free flow of commerce among the States and with foreign nations" and "[t]*o insure the complete and full enjoyment by all persons of the rights, privileges, and immunities secured and protected by the Constitution.*" H.R.Rep. No. 914, 88th Cong., 1st Sess. (1963) (emphasis added).

The fact that it was upheld as an exercise of Congress' power under the Commerce Clause, does not eclipse the fact that one purpose of the Civil Rights Act was to insure the protection of rights under the fourteenth amendment. *See Heart of Atlanta Motel*, 379 U.S. at 250, 85 S.Ct. at 354 (declining to decide whether Congress' power under the Enforcement Clause of the fourteenth amendment would be sufficient by itself to support enactment of Title II of the Act (public accommodations)); *cf. id.* at 284, 85 S.Ct. at 371-72 (Douglas, J., concurring) (While "economic aspects of the problems of discrimination are heavily accented[,] . . . the objectives of the Fourteenth Amendment were by no means ignored.").

In calling for passage of the civil rights legislation that became the Civil Rights Act of 1964, President Kennedy stated: "In this year of the emancipation centennial, justice requires us to insure the blessings of liberty for all Americans and their posterity —*not merely for reasons of economic efficiency, world diplomacy, and domestic tranquility—but, above all, because it is right.*" Special Message to Congress by the President June 19, 1963 in 109 Cong. Rec. 1055, 1063 (emphasis added).

Because they create individual rights, civil rights laws, unlike economic regulations, fall within the category of "protection of persons." *See* 2 Restatement introductory note to part VII at 150-51.[13] The personal injuries cased by employment discrimination cannot readily be characterized in terms of their "effects" on the forum state. Civil rights are in this respect similar to constitutional guarantees of individual rights which control the exercise of governmental authority over U.S. citizens outside the territory of the United States—without reference to the domestic "effects" of violating the Constitution. *Id.* § 721 reporters' note 2. While regulation of the conduct of private employers under Title VII is obviously different from the regulation of state actors under the Constitution,[14] my point here is simply that the rights protected by Title VII are, like constitu-

[13] Indeed, in the same section, the Restatement notes without criticism that "[s]ome United States civil rights legislation protects United States nationals outside the United States." Restatement § 721 reporters' note 13 (citing *Bryant*, 502 F.Supp. 472 (D.N.J.1980) (applying Title VII extraterritorially)).

[14] Actions by the State, even outside the territory of the United States, must be constrained by the Constitution because the "United States is entirely a creature of the Constitution." *Reid v. Covert*, 354 U.S. 1, 5-6, 77 S.Ct. 1222, 1224-25, 1 L.Ed.2d 1148 (1956) (plurality opinion of Black, J.).

tional rights, personal. *See id.* comment b. It may therefore be inappropriate [15] to evaluate the violation of civil rights in terms of "effects" on the regulating state, even though the extraterritorial application of civil rights laws may be limited by other considerations not applicable to constitutional rights.

If we were to apply the "effects" standard, however, Congress and the courts have long recognized that apart from the personal injuries of discrimination, the cumulative effects of discrimination are pervasive.[16]

Depriving U.S. citizens of a remedy for discrimination experienced while employed abroad by U.S. companies will almost certainly have some effect in the United States. Title VII provides employees with

[15] The Restatement provides that each of the enumerated factors should be evaluated "where appropriate." Restatement § 403(2).

[16] The same "effects" on commerce which allow Congress to regulate the conduct of private employers under Title VII, *supra* note 11, may be sufficient to establish "effects" in the regulating state within the meaning of section 403. *Cf. Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 612 (9th Cir.1976) (noting that Congress' power to regulate foreign commerce is not subject to same restrictions as power to regulate interstate commerce, and effects test for extraterritorial jurisdiction must therefore be informed by "notions of comity and fairness").

Because section 403 requires us to consider other factors in exercising extraterritorial jurisdiction, there is no reason to discard the analysis, already accepted by the courts, that the cumulative economic effects of discrimination are sufficient to justify regulation. *See* L. Tribe, American Constitutional Law 310 (1988) (discussing "cumulative effect" principle as constitutional justification for civil rights legislation).

an avenue to vindicate themselves in the event of an unjust firing, a poor reference, or sudden resignation that is in reality the result of discrimination. Today's decision means that one U.S. citizen assigned to the Saudi office of a U.S. corporation, and another U.S. citizen working for the same company in Texas could experience identical acts of discrimination, but only the latter will have a remedy. This situation creates a dilemma for minorities and women: foreign assignments will be less attractive, while refusal of such an assignment could limit an individual's opportunity for advancement. As the EEOC notes, assignment to a foreign office is frequently a required step on the corporate ladder. Extraterritorial application of Title VII may therefore be necessary to ensure that members of protected groups have equal opportunities with respect to foreign assignments that would affect their employment opportunities in the United States. Extraterritorial application of Title VII would also protect the "justified expectations" of U.S. citizens that they will not lose all protection from discrimination by their employers simply because they have been assigned to a foreign office. Restatement § 403(2)(d).

The territorial connections to the regulating state are in any event buttressed by the fact that both "the person principally responsible for the activity to be regulated" and "those whom the regulation is designed to protect" are in this case U.S. nationals—U.S. corporations [17] and their employees who are U.S. citizens. Restatement § 403(2)(b).

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[17] "Regulating the activities of businesses incorporated within a state is one of the oldest and most established examples of prescriptive jurisdiction." *Laker Airways*, 731 F.2d at 926.

It is also incorrect to characterize Title VII's purposes as purely domestic. The legislative history of Title VII reveals that one purpose of the statute was to improve the image of the United States in the international community at a time when this nation's failure to address discrimination—particularly racial discrimination—had become a source of international criticism and domestic embarassment. H.R.Rep. No. 1370, 87th Cong., 2d Sess. 2156 (1962) (report on Equal Employment Opportunity Act—a forerunner of H.R. 405 which was incorporated into Title VII of H.R. 7152; H.R. 7152 became the Civil Rights Act of 1964) ("continued employment discrimination in the United States casts doubt upon our sincerity in furthering the cause of individual liberty and human dignity"); *See also* Special Message to Congress by the President *supra* at 1055 (legislative inaction on civil rights would result in "weakening the respect with which the rest of the world regards us"). In light of these concerns, the majority's holding today is particularly ironic: U.S. corporations will be allowed to discriminate against U.S. citizens in their foreign offices where their actions will be more immediately visible to other states.

Finally, the international community has adopted a number of conventions calling for an end to discrimination—against many of the groups protected by Title VII.[18] The international consensus condemning

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[18] *See, e.g.*, International Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 195, U.N. Doc. A/6014 (1965); Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, U.N. Doc. A/34/46 (1979).

Many of these agreements have been signed by the United States, but have not been ratified by the Senate. Most of the

discrimination extends to discrimination in employment. Note, *Equal Employment Opportunity for Americans Abroad*, 62 N.Y.U. L.Rev. 1288, 1298 & nn. 66-69 (1987) (international treaties and agreements as well as the proposed Draft Code of Conduct on Transnational Corporations prohibit discrimination in hiring, pay, and promotions). Since Title VII expands on antidiscrimination principles that have been the subject of international concern, there can be no doubt that the desirability of the regulation is generally accepted, and that the regulation is important to the international community and consistent with the traditions of the international system. Restatement § 403(2)(c), (e) & (f).

The United States' interest in enforcing the civil rights of its citizens against violations by U.S. corporations is therefore not only sufficiently strong to support the exercise of extraterritorial jurisdiction, but also is consistent with the interests of the international community in eradicating discrimination. Congressional intent to apply Title VII extraterritorially should therefore be defeated only if such application would be an affront to the sovereignty of other nations.

ARAMCO and Amicus Curiae argue that labor laws are of particularly local concern, and that most states apply their own labor laws on a territorial basis. They therefore conclude that extraterritorial application of Title VII would offend other nations and produce inevitable conflicts of law—a contention echoed in the majority opinion.

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protections that the United States would owe to its citizens under these agreements are already provided by the Constitution and federal and state law. *See* 2 Restatement introductory note to Part VII at 150.

As noted above, section 403 does not purport to eliminate concurrent jurisdiction. There is no principle of international law which "separates jurisdiction to prescribe into neatly adjoining compartments of national jurisdiction." *Laker Airways*, 731 F.2d at 952.

ARAMCO essentially urges that the untidiness of concurrent jurisdiction may be avoided by applying the reasonableness inquiry to preclude the extraterritorial application of a statute wherever it is possible that another state would exercise jurisdiction over the same activity. This reading, however, also fails to produce a perfectly coherent jurisdictional scheme. Because the reasonableness constraint applies to both the territorial and nationality bases of jurisdiction, the extreme deference to other nations urged by ARAMCO could create a jurisdictional vacuum. We do not know, for example, to what extent a foreign state would enforce its own laws to regulate the employment relationship between a U.S. corporation and employees who are U.S. citizens, or whether it would make its administrative and judicial procedures available to a U.S. employee seeking to bring a grievance against a U.S. employer. A foreign state, applying the principles of section 403 could well conclude that exercise of its territorial jurisdiction would be unreasonable in such a case. Indeed, the cases relied upon by the majority include those in which the courts of the United States have declined to apply the protections of U.S. law in precisely that situation. *See, e.g., Benz v. Compania Naviera Hidalgo*, 353 U.S. 138, 77 S.Ct. 699, 1 L.Ed.2d 709 (1957) (declining to apply the Labor Management Relations Act to wage dispute between foreign employer and foreign crew although

within the territorial jurisdiction of the United States).

International discord does not arise from the existence of concurrent jurisdiction alone as much as it arises from an attempt to regulate the conduct of foreign nationals.[19]

Cases involving extraterritorial application of the Lanham Act divide along precisely this line. Although other nations have concurrent jurisdiction to regulate the use of trademarks in their territory, the United States may, in the absence of an actual conflict of law, apply the Act to the conduct of U.S. nationals abroad. *Steele*, 344 U.S. 280, 73 S.Ct. 252; *American Rice, Inc. v. Arkansas Rice Growers Co-operative Ass'n*, 701 F.2d 408 (5th Cir.1983); *Ramirez & Feraud Chili Co. v. Las Palmas Food Co.*, 146 F.Supp. 594 (S.D.Cal.1956), *aff'd*, 245 F.2d 874 (9th Cir.1957), *cert. denied*, 355 U.S. 927, 78 S.Ct. 384, 2 L.Ed.2d 357 (1958). The Act does not, however, apply extraterritorially to foreign nationals. *Vanity Fair Mills v. T. Eaton Co.*, 234 F.2d 633 (2d Cir.), *cert. denied*, 352 U.S. 871, 77 S.Ct. 96, 1 L.Ed. 2d 76 (1956).

The cases involving extraterritorial application of labor laws similarly demonstrate that an attempt to regulate the conduct of foreign nationals presents the most serious affront to the sovereignty of other nations. In *Foley Bros.*, the Supreme Court refused to

[19] In *Timberlane*, the Ninth Circuit suggested that extraterritorial application of the Sherman Act could be moderated to reduce international tensions by affording greater consideration to the nationality of the parties. The court noted that "applying American laws to American citizens raises fewer problems than application to foreigners." 549 F.2d at 612.

construe the Eight Hour Law to apply extraterritorially to a U.S. national employed by an American contractor in Iran. 336 U.S. 281, 69 S.Ct. 575 (1949). However, the Court emphasized that the Act did not distinguish "between laborers who are aliens and those who are citizens of the United States." *Id.* at 286, 69 S.Ct. at 578. The Court reasoned that if the law was applied extraterritorially to U.S. citizens, it "would be logically inescapable" that the law would apply to aliens employed abroad as well. *Id.* The Court was thus most troubled by the possibility that the law would by logical extension require an intrusion into the realm of "labor conditions which are the primary concern of a foreign country"—the labor conditions of its own citizens. *Id.*

The Court discounted an opinion of the Attorney General construing the Act to apply extraterritorially on the same grounds:

> The opinion . . . proves too much. Although Attorney General Moody denied that incongruous results would flow from his interpretation, it would be anomalous, as we have said, for an act of Congress to regulate the hours of a citizen of Iran at work on a government project there. . . . Since the statute contains no distinction between laborers based on citizenship, Attorney General Stone's reasoning that aliens are not covered points to the conclusion that the statute does not apply to contracts which are to be performed in foreign countries.

Id., 336 U.S. at 289, 69 S.Ct. at 579. The Court thus concludes that absent a distinction between aliens and U.S. citizens employed abroad, the Act must apply to both aliens *and* citizens employed abroad, or to

neither. Therefore, because it would infringe upon the sovereignty of other nations to apply the Law to foreign nationals employed abroad, the Act could not be construed to apply to citizens employed abroad.

Similarly, the Supreme Court in both *Benz v. Compania Naviera Hidalgo*, 353 U.S. 138, 147, 77 S.Ct. 699, 704, 1 L.Ed.2d 709 (1956) (LMRA) and *McCulloch*, 372 U.S. at 21, 83 S.Ct. at 677-78 (NLRA), refused to "run interference in . . . a delicate field of international relations" by construing U.S. labor laws to apply to foreign seamen employed on vessels registered under a foreign flag. While these cases involved principles unique to the law of the sea, the nationality of the parties was clearly a source of concern for the Court.[20]

The alien exemption provision of Title VII, which provides the strongest evidence of congressional intent to apply Title VII extraterritorially, eliminates the very factor which has barred the extraterritorial application of U.S. labor laws.[21] Because this provision

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[20] Neither *McCulloch* nor *Benz* is cited in the Restatement's discussion of the presumption against extraterritoriality. *Benz*, however, is cited in the section on Law of the Sea. § 512 reporters' note 5 (jurisdiction over foreign vessels in port).

[21] The majority cites several other examples of cases in which courts have refused to apply U.S. labor laws extraterritorially. These cases are readily distinguishable: First, the majority cites several cases holding that the Railway Labor Act does not apply extraterritorially. The RLA, however, incorporates a provision of the Interstate Commerce Act which explicitly restricts its application to carriers engaged in transportation within the United States. *See Air Line Stewards and Stewardesses Ass'n v. Trans World Airlines*, 273 F.2d 69, 71 (2d Cir.1959); *Airline Dispatchers*

insures that the statute will *not* intrude on the area of labor relations which is the "primary concern" of foreign nations, extraterritorial application of Title VII is unlikely to offend the sovereignty of other states. *See id.* Furthermore, there is no attempt in this case to impose the requirements of Title VII on foreign corporations employing U.S. citizens abroad—another area likely to be of "primary concern" to foreign states. I would conclude that "the rights of other nations or their nationals are not infringed" by extraterritorial application of Title VII, and therefore "the United States is not debarred by any rule of international law from governing the conduct of its own citizens . . . in foreign countries." *Steele*, 344 U.S. at 285-86, 73 S.Ct. at 255-56. This is not to say that extraterritorial application of Title VII would always be appropriate: it may not be, particularly in the case of an actual conflict of law. The possibility of such conflict is not, however, sufficiently great to render extraterritorial application of Title VII unreasonable.

In fact, Title VII contains provisions that allow conflicts with foreign law to be minimized. For example, this court has allowed an employer to use the bona fide occupational qualification (BFOQ) exception, 42 U.S.C. § 2000e-2(e), to assert the requirements of foreign law as a defense to a Title VII claim.

Ass'n v. Nat'l Mediation Board, 189 F.2d 685, 690 (D.C.Cir.), *cert. denied*, 342 U.S. 849, 72 S.Ct. 77, 96 L.Ed. 641 (1951).

Second, the majority cites cases holding that the Age Discrimination in Employment Act does not apply extraterritorially. The ADEA, however, has been explicitly distinguished from Title VII because it does not contain a provision exempting aliens employed abroad. *Pfeiffer v. Wm. Wrigley, Jr. Co.*, 755 F.2d 554, 559 (7th Cir.1985).

Kern v. Dynaelectron, 577 F.Supp. 1196 (N.D.Tex. 1983), *aff'd mem.*, 746 F.2d 810 (5th Cir.1984) (affirmed on basis of reasons stated by the district court). In *Kern*, the district court held that in extraordinary circumstances, a prohibited classification could itself be a BFOQ. *Id.* at 1201. The plaintiff had alleged discrimination on the basis of religion because Dynaelectron, a U.S. corporation which operated a helicopter pilot service in Saudi Arabia, employed only Moslem pilots to conduct flights from Jeddah to the holy city of Mecca. The employer asserted as his defense a Saudi law prohibiting non-Moslems from entering the holy area of Mecca. The penalty for violation of the law was severe—death by beheading. *Id.* at 1200. The court concluded that under the circumstances, religion was a BFOQ for the job of piloting flights from Jeddah to Mecca. *Id.* at 1201.

Although the availability of the BFOQ defense in cases of less extreme conflicts with foreign law has not been tested, *Kern* indicates that the defense could provide a basis for reconciling legitimate conflicts.[22]

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[22] I do not mean to sugest that courts should not continue to be sparing in their application of the BFOQ defense. In particular, courts should be wary of vague assertions of inconsistent legal reqirements or cultural differences "which might afford [an employer] a pretext that [the granting of] relief would impugn foreign law." *Steele*, 344 U.S. at 280, 73 S.Ct. at 252 (no conflict where Mexican registration of trademark had been cancelled); *see also Fernandez v. Wynn Oil Co.*, 653 F.2d 1273 (9th Cir. 1981) (alleged chauvinism of South American businessmen should not provide basis for holding that being male was BFOQ); Note, *Equal Employment Opportunity for Americans Abroad*, 62 N.Y.U. L.Rev. 1288, 1301-11 (1987) (criticizing use of BFOQ defense as grounds to defeat extraterritorial application of Title VII and as vehicle for avoiding conflicts of law).

The argument that extraterritorial application of Title VII is unreasonable because it would offend the sovereignty of other nations is not persuasive. The fact that another nation may exercise jurisdiction over employment relations on the basis of territory does not render the exercise of U.S. jurisdiction on the basis of nationality unreasonable. The likelihood that concurrent jurisdiction would produce international discord is minimized by the fact that the United States seeks to regulate *only* the conduct of its own nationals and by the fact that Title VII may be reconciled with foreign law in the event of a conflict.

The fact that one could hypothesize particular situations in which the extraterritorial application of Title VII to U.S. citizens employed by U.S. corporations would conflict with foreign law does not compel a holding that Title VII may never extend its protections beyond U.S. borders. This construction of section 403 would place an untenable restriction on U.S. sovereignty. We would be required to defeat congressional intent to apply a statute extraterritorially unless Congress was able to anticipate and resolve every potential conflict of jurisdiction, or unless Congress met the *McCulloch* standard by expressing an affirmative intent to apply a statute extraterritorially whether reasonable or not. This would make extraterritorial jurisdiction an all or nothing proposition, eliminating a middle ground on which Congress could exercise extraterritorial jurisdiction in a more limited fashion. This result in neither compelled by the Restatement nor desirable.

For the purposes of this case, the Restatement requires only that we conclude that extraterritorial application of Title VII would in general be reasonable.

Because Congress *cannot* anticipate every conflict of law, it must necessarily rely on the courts to make a more individualized determination of the propriety of exercising extraterritorial jurisdiction in a particular case. The constraints of section 403 apply to exercises of prescriptive jurisdiction not only by Congress, but by all government entities.[23] The courts will therefore be guided in individual cases by the same principles of reasonableness that apply to our evaluation of Congress' initial exercise of extraterritorial jurisdiction.

Thus, while I would hold that extraterritorial application of Title VII would in general be reasonable, I would also recognize that it may be appropriate in some circumstances for a U.S. court to decline to apply Title VII extraterritorially. In the instant case, the factors that might influence a more individualized decision whether to apply Title VII extraterritorially have not been fully briefed and are therefore not considered here.

III. The Language and Legislative History of Title VII

Since extraterritorial application of Title VII would not be unreasonable and therefore does not violate principles of international law, we do not need

[23] Prescriptive jurisdiction is defined as jurisdiction of a state "to make its law applicable to the activities, relations, or status of persons, or the interests of persons in things, whether by legislation, by executive act or order, by administrative rule or regulation, or by determination of a court." Restatement § 401(a). The traditional equation of jurisdiction to prescribe with *legislative* jurisdiction was discarded in recognition of the increasingly complex relationship between the roles of different branches of government. *Id.* introductory note to Part IV at 230.

to search for an *affirmative* expression of congressional intent to apply Title VII extraterritorially. Rather, we may employ the traditional methods of statutory interpretation to determine whether the presumption against extraterritoriality is overcome by the "contrary intent" of Congress. *See Foley Bros.*, 336 U.S. at 285, 69 S.Ct. at 577-78; *Natural Resources Defense Council v. Nuclear Regulatory Comm'n*, 647 F.2d 1345, 1357 n. 54 (D.C.Cir.1981).

In asserting that Congress intended Title VII to apply extraterritorially,[24] Boureslan and Amicus EEOC rely primarily on the "alien exemption provision," 42 U.S.C. § 2000e-1, which provides in relevant part: "This subchapter shall not apply to an employer with respect to the employment of aliens outside any State." The stated purpose of this provision was "to remove conflicts of law which might otherwise exist between the United States and a foreign nation in the employment of aliens outside the United States by an American enterprise."[25] *Civil Rights:*

[24] It is not disputed that Title VII's definition of "employer" is sufficiently expansive to support application of Title VII beyond the territory of the United States. "Employer" is defined as any "person engaged in an industry affecting commerce" who has a specified number of employees who work a specified number of days. 42 U.S.C. § 2000e(b).

[25] The majority dismisses this piece of legislative history, arguing that we must not "substitute legislative history for the language of the Act." The language of the statute is not, however, inconsistent with the legislative history. Both the plain language of the statute, interpreted according to the established canons of statutory construction, and the legislative history compel a single conclusion: that Congress intended Title VII to apply extraterritorially.

It is instead the majority's conclusion that Title VII does *not* apply extraterritorially that requires us to ignore the

Hearings on H.R. 7152 Before the House Committee on the Judiciary, 88th Cong., 1st Sess. 2303 (1963) (testimony of James Roosevelt, Member of Congress from the State of California) (explaining provisions of H.R. 405 which was incorporated into Title VII of H.R. 7152).[26]

Since Title VII expressly exempts from coverage aliens employed abroad by U.S. corporations, the logical negative inference is that Title VII was intended to cover U.S. citizens employed abroad. Indeed, the alien exemption provisions would be meaningless if Title VII did not apply extraterritorially: there is no need to exempt aliens employed abroad from coverage if *no one* is covered abroad. Construction of a statute to render a provision meaningless violates the established rule of statutory construction which obliges a

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canons of statutory construction and the clear evidence of legislative history.

[26] Contrary to the majority's assertion, the collaborative nature of Title VII's legislative history requires that these hearings be given special weight. H.R. 405 originated in the Committee on Education and Labor, but was incorporated by the Judiciary Committee into H.R. 7152. Title VII is thus a hybrid of bills originating in two committees. Although the Judiciary Committee subsequently amended H.R. 7152, the coverage provisions of Title VII, including the alien exemption provision, were not changed. Representative Roosevelt's explanation of the provisions of H.R. 405, based on the conclusions of the Committee on Education and Labor, is thus equivalent to a committee report for purposes of determining the objectives of the provisions that were incorporated wholesale from H.R. 405. Such discussions of statutory meaning are accepted as the most "persuasive indicia of congressional intent." *Mills v. United States*, 713 F.2d 1249, 1252 (7th Cir.1983), *cert. denied*, 464 U.S. 1069, 104 S.Ct. 974, 79 L.Ed.2d 212 (1984); *see also Johnson v. Department of Treasury*, 700 F.2d 971, 974 (5th Cir.1983).

court "to give effect, if possible, to every word Congress used." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339, 99 S.Ct. 2326, 2331, 60 L.Ed.2d 931 (1979); *accord United States v. Reeves*, 152 F.2d 995, 998 (5th Cir.1985) ("A statute should be read to avoid rendering its language redundant if reasonably possible."); *Goff v. Taylor*, 706 F.2d 574, 587 n. 34 (5th Cir. 1983) ("It is well established that a statute should be construed so that each of its provisions is given full effect; interpretations which render parts of a statute inoperative or superfluous are to be avoided."); *Quarles v. St. Clair*, 711 F.2d 691, 701 n.32 (5th Cir.1983) (same); *Duke v. University of Texas at El Paso*, 663 F.2d 522, 526 (5th Cir.1981) (same); *Beisler v. Commissioner*, 814 F.2d 1304, 1307 (9th Cir.1987) ("We should avoid an interpretation of the statute that renders any part of it superflous and does not give effect to all of the words used by Congress.").

The majority maintains that it has not deprived the alien exemption provision of all meaning because another negative inference may be drawn from the provision:[27] that aliens are covered by the statute when employed within the United States. The majority relies for this proposition on *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 95, 94 S.Ct. 334, 339-40, 38

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[27] The majority's assertion that the provision still has meaning because it means what it says—that aliens employed abroad are not covered—is purely semantic. As stated above, the alien exemption provision is completely superfluous if the statute does not cover *any* individual employed abroad. There is no difference between interpreting a statute to render a provision superfluous and interpreting a statute to deprive a provision of meaning: Semantic distinctions aside, both violate the canons of statutory construction. *See* cases cited *supra*.

L.Ed.2d 287 (1973), in which the Supreme Court held that Title VII applied to aliens employed in the United States but did not prohibit an employer from discriminating on the basis of citizenship or alienage. That is, Title VII protected aliens from discrimination on the basis of race, religion, color, sex, or national origin, but did not make alienage *itself* a prohibited classification.

The majority's reliance on *Espinoza* is misplaced. The Supreme Court does not rely solely on the negative inference it draws from the alien exemption provision, nor does it discuss the legislative history of the provision which supports the interpretation advanced by Boureslan and the EEOC. It would therefore be erroneous to conclude that the Supreme Court's passing reference in *Espinoza* to the alien exemption provision was intended to attach only one negative inference to the proviso.

A negative inference drawn from the alien exemption provision was not necessary to bring aliens within the scope of Title VII's domestic protections. As the Supreme Court notes in *Espinoza*, the use of the term "individual" in defining "employee" is sufficient to bring aliens within the statute's coverage. *Id* Any construction of the term "individual"—as distinct from "citizen"—to exclude aliens would be inconsistent with principles of equal protection.[28] While the precise level of scrutiny applied to classifications based on alienage has varied,[29] it is well estab-

[28] Principles of equal protection are, of course, incorporated into the due process clause of the fifth amendment and therefore are applicable to acts of the federal government. *Bolling v. Sharpe*, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954).

[29] *See* L. Tribe, American Constitutional Law 1544-53 (1988).

lished that aliens are "persons" within the meaning of the fifth and fourteenth amendments, and are entitled to the equal protection of the laws of the United States. *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886); *Truax v. Raich*, 239 U.S. 33, 36 S.Ct. 7, 60 L.Ed. 131 (1915). Therefore, Congress could not have excluded aliens residing in the United States[30] from the coverage of Title VII without drawing an explicit distinction between aliens and citizens, and providing justification for the distinction sufficient to satisfy equal protection analysis under the due process clause. While it may be appropriate for the Supreme Court to cite the alien exemption provision in support of the obvious conclusion that aliens are covered by Title VII when employed in the United States, the majority's contention that this is the sole meaning to be attached to the provision is nonsensical. Given that aliens are "employees" within the meaning of Title VII in precisely the same sense that citizens are employees, it would be absolutely unnecessary to state that Title VII does not apply to aliens employed abroad unless the statute *did* apply to U.S. citizens employed abroad. Again, the majority's analysis renders the alien exemption clause completely superfluous, in violation of the canons of statutory construction. *See* cases cited *supra*.

Congress' intent to apply Title VII extraterritorially is even more apparent if the alien exemption clause is read in light of the contemporary case law regarding the extraterritorial application of U.S. labor laws and the application of U.S. labor laws to

[30] Equal protection principles "are universal in their application, to all persons within the territorial jurisdiction" of the United States. *Yick Wo.*, 118 U.S. at 369, 6 S.Ct. at 1070-71; *see also* note 28 *supra*.

foreign nationals. The Supreme Court appeared at the time to regard the application of U.S. law to *foreign nationals* as a primary source of conflict with other nations. *See* cases discussed *supra* in section II.

Congress' statement that the alien exemption provision was intended to avoid conflicts of law is perfectly logical in the context of this case law: Congress could reasonably have concluded that exempting aliens employed abroad would eliminate any obstacles to protecting U.S. citizens employed abroad by U.S. corporations.

Taken together, the language and legislative history of Title VII evidence a clear intent of Congress to apply Title VII to U.S. citizens employed abroad by U.S. corporations. This showing is sufficient to overcome the presumption against extraterritoriality. *See Mitchell*, 553 F.2d at 1002.

IV. Conclusion

Although the issue presented in this case—whether Title VII applies to U.S. citizens employed abroad by U.S. corporations—appears simple on its face, its resolution turns on a complex interaction between international law and principles of statutory construction.

The majority errs in attempting to resolve the complex issues raised in this case through a single instrument of analysis: the presumption against extraterritoriality. In the process, the majority distorts the presumption and, in the name of judicial deference to the legislative branch, defeats congressional intent to apply Title VII exterritorially—without reaching the issue that would justify its conclusion: whether extraterritorial application of Title VII would violate international law.

In order to more carefully evaluate whether the evidence of congressional intent presented in this case is sufficient to support an exercise of extraterritorial jurisdiction, I have employed a two-step inquiry.

The first inquiry is whether extraterritorial application of Title VII would violate section 403 of the Restatement which provides that as a matter of international law, a state may not exercise its jurisdiction to prescribe laws affecting persons or activities connected with another state when it is unreasonable to do so.

Applying the factors listed in the Restatement, it is clear that extraterritorial application of Title VII would not in general be unreasonable. First, the interest of the United States in applying its civil rights laws to its own nationals is sufficiently strong to support the exercise of extraterritorial jurisdiction and is consistent with the interest of the international community in eliminating discrimination. Second, extraterritorial application of Title VII would not offend the sovereignty of other nations because the statute does not attempt to regulate the conduct of foreign nationals. ARAMCO's contention that the United States should defer to the jurisdiction of other states to prescribe employment laws within their own territory would, in the absence of any actual conflict of law, place an untenable restriction on the sovereignty of the United States. The potential for conflict is minimized by the fact that Title VII may be construed to reconcile the competing demands of U.S. and foreign law when a conflict does occur.

Since extraterritorial application of Title VII would not violate the principles embodied in section 403, we do not need to search for an *affirmative* statement of congressional intent. The presumption

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against extraterritoriality may be overcome if the language and legislative history of Title VII express a clear (if not affirmative) intent to apply the statute extraterritorially. Applying the canons of statutory construction to the plain language of the statute and referring to the legislative history to determine Congress' intent, only one conclusion is possible: Congress intended that Title VII's protections would extend to U.S. citizens employed abroad by U.S. corporations.

While the exercise of extraterritorial jurisdiction necessarily raises sensitive issues of international law, U.S. employers should not be allowed to escape liability for discrimination by cloaking themselves in a conveniently acquired concern for the integrity of the sovereignty of foreign states. In holding that Title VII affords no protection from employment discrimination to U.S. citizens employed abroad by U.S. corporations, the majority defeats Congress' intent to the contrary. Because I believe that we could give effect to Congress' intent without intruding upon the sovereignty of other nations, I must respectfully dissent.

APPENDIX C

UNITED STATES DISTRICT COURT
S.D. TEXAS
HOUSTON DIVISION

Civ. A. No. H-85-3506

ALI BOURESLAN

v.

ARAMCO, ARABIAN AMERICAN OIL COMPANY
and ARAMCO SERVICES COMPANY

Jan. 27, 1987

MEMORANDUM AND ORDER

DEANDA, District Judge.

Pending before the court are Defendants' motions to dismiss under Rule 12(b)(1) for lack of subject matter jurisdiction. For the reasons stated below, the court finds the motions should be granted.

Plaintiff, Ali Boureslan, is an American citizen who was born in Lebanon and resides in El Paso, Texas. Plaintiff instituted this action against Arabian American Oil Company (Aramco) and Aramco Services Company (ASC). Aramco is a Delaware corporation with its principal place of business in Dhahran, Saudi Arabia. Aramco is licensed to do business in Texas. ASC is a Delaware corporation with its principal place of business in Houston, Texas.

Plaintiff was first employed as an engineer for ASC in Texas beginning July of 1979. In November of 1980 Plaintiff was transferred to work for Aramco in Saudi Arabia. Plaintiff's troubles began in September of 1982, when Plaintiff's supervisor allegedly began harassing Plaintiff about his national origin, race and religion. Plaintiff's status deteriorated, eventually resulting in termination on June 16, 1984. Plaintiff relied on 42 U.S.C. § 2000e for jurisdiction but alleges state law causes of action in addition to his Title VII claim.

Defendants urge the court to dismiss Plaintiff's claims for lack of subject matter jurisdiction. Defendants argue that Title VII does not apply to Plaintiff's employment in Saudi Arabia and Plaintiff's state law claims should be likewise dismissed for lack of pendent jurisdiction.

The case law discussing whether Title VII has extraterritorial application is scant. *Bryant v. International Schools Services*, 502 F.Supp. 472 (D.N.J. 1980), *rev'd on other grounds*, 675 F.2d 562 (3d Cir. 1982), is on point. In *Bryant* the court ruled that Title VII did have extraterritorial application. The court relied on Title VII's exemption of "aliens outside of any State," negatively inferring that Title VII must apply to citizens employed outside the United States. *See* 42 U.S.C. § 2000e-1; 502 F.Supp. at 482. The court cited *Love v. Pullman Co.*, 13 F.E.P. 423 (D.Col.1976), a case in which the court, in a footnote, drew the same negative inference. *See* 13 F.E.P. at 426 n. 4.

Since *Bryant* no court has confronted and ruled on the extraterritorial issue. Several courts have cited *Bryant* in deciding whether the Age Discrimination in Employment Act (ADEA) applies extra-

territorially. *See, e.g., Cleary v. United States Lines, Inc.*, 728 F.2d 607, 609 (3d Cir.1984). The E.E.O.C. has accepted *Bryant* as the law. *See, e.g.*, E.E.O.C. Dec. No. 84-2, 33 F.E.P. 1893 (Dec. 2, 1983). While no circuit court has decided the extraterritorial question, the Court of Appeals for the Third Circuit remarked, in *dicta*, that the reasoning behind the negative inference is controversial. *Cleary*, 728 F.2d at 609.

Indeed, the negative inference underlying the *Bryant* decision is suspect. In *Espinoza v. Farah Manufacturing Co.*, 414 U.S. 86, 94 S.Ct. 334, 30 L.Ed.2d 287 (1973), the Supreme Court drew a different inference from the identical Title VII language. The Court held that by exempting "aliens outside of any State" Congress intended to include aliens inside the United States within Title VII's coverage. 414 U.S. at 95, 94 S.Ct. at 340.

Abandoning the *Bryant* precedent does little more than send the court back to square one. An examination of Title VII's legislative history offers little guidance; the extraterritorial issue is not mentioned. The most that one can glean from the legislative history is that Congress enacted Title VII to remedy domestic discrimination. *See, e.g.*, H.R. Rep. No. 914, 88th Cong., 2nd session, *reprinted in* 1964 U.S. Code Cong. & Ad.News 2355, 2393 (focusing on domestic discrimination). There is no indication that Congress was concerned about discrimination abroad. Legislative efforts in 1964 were directed towards eliminating discrimination in the United States. It is doubtful that Congress considered enacting legislation to counter discrimination against citizens abroad.

Title VII's language does not support extraterritorial application. As previously noted, reliance on the language exempting "aliens outside of any State"

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is erroneous. Additionally, Title VII applies only to "employers." The statute defines "employer" as one "engaged in any industry affecting commerce who has fifteen or more employees. . . ." 42 U.S.C. § 2000e (b). Title VII at Section 2000e(g), defines commerce as

> [T]rade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

Section 2000e(h) further defines "industry affecting commerce" as including activity or industry affecting commerce within the meaning of the Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 402(c). The Labor Management Reporting and Disclosure Act defines industry affecting commerce as industry included under the Labor Managements Relations Act. Finally, the Supreme Court has held that the Labor Management Relations Act has no extraterritorial application. *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 83 S.Ct. 671, 9 L.Ed.2d 547 (1963); *Benz v. Compania Navieia Hidalgo*, 353 U.S. 138, 77 S.Ct. 699, 1 L.Ed.2d 709 (1957).

A study of the statutory language and legislative history reveals, if anything, that Congress did not intend Title VII to apply extraterritorily. *See Pfeiffer v. Wm. Wrigley, Jr. Co.*, 755 F.2d 554 (7th Cir. 1985). At a minimum, the absence of a clearly expressed intent creates a presumption that Congress did not intend extraterritorial application. *See Foley*

Bros. v. Filardo, 336 U.S. 281, 69 S.Ct. 575, 93 L.Ed. 2d 680 (1949). It is doubtful that Congress reserved the question of Title VII's application for the courts to decide. It is much more likely that Congress never considered the issue.

Examining the development of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634 is instructive. When enacted, ADEA was silent on the question of extraterritorial application. Courts struggled with the issue but concluded that Congress did not intend ADEA to apply extraterritorially. *See, e.g., Cleary v. United States Lines, Inc.*, 728 F.2d 607 (3d Cir.1984); *Thomas v. Brown & Root, Inc.*, 745 F.2d 279 (4th Cir.1981). In 1984, Congress amended the ADEA. Congress included in the definition of employee "any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country." 29 U.S.C. § 630(f). Thus, Congress added a clear statement, obviating the need for judicial guesswork.

In *Pfeiffer v. Wm. Wrigley, Jr. Co.*, 755 F.2d 554 (7th Cir.1985), the court held that ADEA did not apply extraterritorially. Judge Posner, writing for the court, found the lack of statutory language and legislative history persuasive. *See id.* at 556-57. The decision is important because the court issued its ruling knowing that Congress amended the ADEA to apply extraterritorially. Judge Posner pointed out that the amendment did not apply retroactively. *See id.* at 559. The court rejected Plaintiff's argument that the amendment clarified the original act. *See id.* Judge Posner asserted that Congress may have intended to change the law, not elucidate it. *See id.*

Following the reasoning in *Peiffer*, even if Congress did amend Title VII to apply extraterritorily,

the court should rule against extraterritorial application. Of course, Congress has not amended Title VII. The court must base its decision on the applicable statute and its legislative history, which do not support extraterritorial application.

Finally, there are significant policy reasons for not applying Title VII abroad. Imposing Title VII abroad infringes on the sovereignty of other nations. Indeed, in the case at hand Saudi Arabia has enacted its own statute, the Labor and Workman Law of 1959. Many of its provisions conflict with Title VII. Given the potential conflict, it should be Congress that mandates extraterritorial application. *See Pfeiffer*, 755 F.2d at 554.

The court thus concludes Title VII should not be applied extraterritorily. Accordingly, Defendants' motions to dismiss under Rule 12(b)(1) should be granted. Plaintiff's state law claims should also be dismissed for lack of pendent jurisdiction. *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966). The court hereby

ORDERS Defendant Aramco's motion to dismiss under Rule 12(b)(1) is GRANTED. The court further

ORDERS Defendant ASC's motion to dismiss under Rule 12(b)(1) is GRANTED. The court further

ORDERS Plaintiff's state law claims are DISMISSED for lack of pendent jurisdiction.

APPENDIX D

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 87-2206

ALI BOURESLAN, PLAINTIFF-APPELLANT

v.

ARAMCO, ARABIAN AMERICAN OIL CO.
and ARAMCO SERVICE COMPANY,
DEFENDANTS-APPELLEES

Dec. 23, 1988

Appeal from the United States District Court
for the Southern District of Texas;
James DeAnda, Judge

ON SUGGESTIONS FOR REHEARING EN BANC

(Opinion October 17, 1988, 5th Cir., 1988,
857 F.2d 1014)

Before CLARK, Chief Judge, GEE, RUBIN REAVLEY, POLITZ, KING, JOHNSON, WILLIAMS, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH and DUHE, Circuit Judges.

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BY THE COURT:

A member of the Court in active service having requested a poll on the suggestions for rehearing en banc and a majority of the judges in active service having voted in favor of granting a rehearing en banc,

IT IS ORDERED that this cause shall be reheard by the Court en banc with oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs.

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-2206

ALI BOURESLAN, PLAINTIFF-APPELLANT

versus

ARAMCO, ARABIAN AMERICAN OIL CO.
and ARAMCO SERVICE COMPANY,
DEFENDANTS-APPELLEES

Appeal from the United States District Court
for the Southern District of Texas

[Filed Nov. 7, 1988]

ORDER:

IT IS ORDERED that the motion of former amicus, the United States Equal Employment Opportunity Commission, for leave to intervene as an appellant in the ongoing appeal of this cause is granted.

/s/ W. Eugene Davis
United States Circuit Judge

APPENDIX F

STATUTORY PROVISIONS INVOLVED

Sections 701(b), 701(g), 701(h), 702, and 703(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e(b), 2000e(g), 2000e(h), 2000e-1, 2000e-2(a), provide as follows:

§ 2000e. **Definitions**

For the purposes of this subchapter— * * *

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

* * * * *

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession

of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959 [29 U.S.C. 401 et seq.], and further includes any governmental industry, business, or activity.

* * * * *

§ 2000e-1. **Subchapter not applicable to employment of aliens outside State and individuals for performance of activities of religious corporations, association, educational institutions, or societies**

This subchapter shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

§ 2000e-2. **Unlawful employment practices**

(a) **Employer practices**

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to dis-

criminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

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